IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

No. 2849

ELIZABETH M. PRICE,

Appellant.

vs.

MARIE DEWEY WALLACE,

Appellee.

Upon Appeal from the District Court of the United States for the District of Oregon.

Brief of Appellee

and

Memo on Motion to Dismiss

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MEMO ON OBJECTION TO APPELLATE ISSUES AND MOTION TO DISMISS.

With a solemn judgment of the State of Minnesota standing against appellant in this *same* controversy, and with more than one year to construct an argument for appellant to be filled in by record pages and thrust upon us with only ten days to answer, and with Assignment of Errors which, in the main, left concealed such points as counsel desired to make until we received his brief, we feel that the spirit of the Equitable Procedure of this Court has been violated so greatly to the prejudice of Appellee that our duty impels us to call the whole matter to the *Court's* attention, so that it may enforce its rules; or, if *this Court* decides it

to be a case where an exception should be exercised, that it will then appreciate that the appellant is using a "shot gun method" at a target where we can fire but rifle balls, and that we are compelled to shoot at an imaginary mark set up after his shot, guessing that it hits where he supposed, when he shot, the mark should be.

Under such circumstances, we point the court to its rules and trust for their enforcement with a dismissal; but if the court disagrees with us upon that motion that it will then treat a shot at the real mark as sufficient even though it happens not to cover a tiny speck made by a seggregated shot in its "dying hour."

We claim that the substantial procedure, provided to make issues for trial in this court has not been sufficiently followed to make actual issues for appellee to answer or the court to decide.

There is no pleading in the appellate court to formulate issues except the Assignment of Errors filed with the Petition for Appeal. Both court and counsel are entitled to know what the appellant charges against the decision of the lower court.

If an appellant has only a general notion that he would prefer to scold about a trial decision than to find, and point out, error, then his privilege may be exercised without annoying the appellate tribunal; but if there is a reasonable basis for claiming error, upon controlling points in the case, then it is the privilege, and likewise the duty, to assign those errors as claimed upon the particular points and let issue be taken upon them by concrete application of systematic jurisprudence to the particular case.

Upon this principle all of the Appellate Federal Courts agree. Original Rules of all the Circuit Courts of Appeal, 90 Fed. CXLIII, points the way to all appellants.

Rule XI requires that the Assignment of errors

> "Shall set out separately and particularly each error asserted and intended to be urged." 90 Fed. CLXVI.

Rule 24 (90 Fed. Ch. CL§IV), provides that:

> "A concise abstract or statement of the case, presenting succintly the questions involved, in the manner in which they are are raised. * * * In cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is erroneous."

With no attempt to show in the Assignment of Errors (Rec. pp. 115-119), where, in the transcript, or in the brief (pp. 34-37), where, in the record, exceptions were taken or could be found as to any of the alleged errors as to the decree; with no attempt to point out separately or particularly any error intended to be urged as against the merits of the decree intended to be raised as required by Rule XI, supra, or any particular in which the decree was claimed to be erroneous, as required by Rule 24, supra, the appellant asks us to answer the following *Assignment of Errors.* Rec., p. 115, Brief, p. 34.)

> ASSIGNMENTS OF ERRORS.
>
> "Complainant in the above entitled suit assigns the following errors, to-wit:
>
> I.
>
> "The court erred in its judgment and decree wherein and whereby the court ordered adjudged and decreed that the bill of complaint herein be dismissed.
>
> II.
>
> "The court erred in denying the complainant the relief for which she prayed in her bill of complaint.
>
> III.
>
> "The court erred in rejecting the complainant's offer in evidence of the certain letter of C. A. Brown to the complainant, marked as complainant's Exhibit "F," which letter is in words and terms as follows:
>
> (Here follows said letter in full.)
>
> IV.
>
> "The court erred in rejecting the complainant's offer in evidence of the authenticated copy of in-

ventory of the estate of Peter B. Smith, verified by the defendant herein, which inventory was so offered by the complainant as complainant's Exhibit 'G,' and marked and designated as such.

"WM. H. HALLAM,
"Solicitor for Complainant."

We may possibly find some reference to the last two in some remote corner of the brief, but not yet.

It is our contention that this procedure is a direct and fatal violation of the worst sort, of both the spirit and substance of Rules XI and XXIV, and the decisions of *this* and other courts in the following particulars:

1. *No exceptions pointed out.* No manner of raising any of these points below, or any place where any preservation of error is found, in the Assignment of Errors itself, stance of Rules XI and XXIV, and the decisions of *this*, and other, courts in the following particulars:
or in the brief of counsel, where they are specified (Brief p. 34), and no division of either statement or law is made to aid us in what is meant to be the argument applicable to either of the first two errors; we find a brief reference to the letter in the third assignment on pp. 37-38, by searching the brief; but that letter which is quoted, if properly offered and the proper preservation of exception were pointed out, is so utterly foreign to the defendant, as to be wholly without debatable ground.

The same is true of the inventory unless the court desired to go into an accounting before deciding one to be necessary.

Without assigning the points as error counsel "indicates" his "position' at pages 3 and 4 of Appellant's Brief; but even these are not indicated under systematic discussion.

If counsel has exceptions, as he may have somewhere as to two of his alleged errors, although we have not yet found them, it was for him to point them out.

In Migeon et al vs. Montana Central Co., 77 Fed. 249-258, *this* Court said at 252 of Rule 24:

> "A strict compliance with these provisions would not only be of great advantage to counsel in their arguments, but would materially aid the court, and lessen its labors. It is the duty of an appellant to particularly point out the alleged error upon which he relies, and to directly refer the court to the page of the transcript where the alleged erroneous ruling of the court is to be found. Mr. Gillie's testimony covers 25 pages of the printed record, no portion of which is quoted in the specifications."

Here we have a record of 611 pages.

2. *No particular errors are pointed out in the decree; but the brief makes many suggestions of intended applicability to something.*

As to the first two errors assigned, we think they are entirely too general. They are really meant to raise only the general question of whether the court should have rendered a decree for defendant or granted the relief sought for complainant. It seems to us that the language of *this Court* in Doe v. Waterloo Mining Co., 70 Federal 455-461 (9 C. C. A.) is controlling here:

> "There are sôme nine assignments of error in the transcript. In the brief seven additional assignments of error are made. Appellee maintains that the court should not consider these additional assignments; that rule 11 of this court (47 Fed. vi.) precludes the court from considering them, except on its own motion. The contention of appellant is that these additional assignments are only specifications under the first assignment of error. Rule 11 of this court requires that the assignments of error shall be separately and particularly set out. The object of setting forth assignments of error is to apprise the opposite counsel and the court of the particular legal points relied upon for a reversal of the judgment of the trial court. The attempt to make the assignments of error more particular in a brief is not proper. It is in fact an attempt to amend the record in this particular without permission of court. The assignment of error in question reads as follows: *'There is error in said decree, in this: that said court, upon the whole evidence, should have rendered a decree in favor of the complainant.'* This is too gen-

> eral. There is no specification showing wherein the decree is not supported by the evidence. It is not correct that the seven additional assignments of error are specifications under this assignment."

Counsel has sought to do in this case what this court condemned in the above case.

Other circuits agree.

The Doe case, supra, is cited by Circuit Judge Smith in "specially concurring" with the opinion of the Eighth C. C. A. in Walter Baker & Co. v. Gray, 192 Fed. 921-929:

> "Rule 11 of this court provides that the appellant shall file with the clerk of the court below an assignment of errors which shall set out separately and particularly each error asserted and intended to be urged, and errors not assigned according to this rule will be disregarded, but the court at its option may notice a plain error not assigned. Of course, the last clause is wholly immaterial here as the majority hold there was not only no plain error, but no substantial error. The only assignment of error in this case is:
>
> *'That said court erred in dismissing said complainant's bill with costs to the complainant in denying to the complainant an injunction in the term as prayed for in said complainant's bill of complaint, and in refusing to direct an accounting of profits and damages.'*
>
> In my judgment this is a wholly insufficient assignment of errors. Stevens v. Gladding, 19 How. 64, 15 L. Ed. 569; Oswego Township v. Travelers' Insurance Co., 70 Fed. 225, 17 C. C. A. 77; The Myrtie M. Ross, 160 Fed. 19, 87 C. C. A. 175; United States v. Stone & Downer Co., 175 Fed. 33, 99 C. C. A. 49; Deering v. Kelly, 103 Fed. 261, 43 C. C. A. 225; Louisiana Co. v. Levee Commissioners, 87 Fed. 594, 31 C. C. A. 121; United States v. Ferguson, 78 Fed. 103, 24 C. C. A. 1; Doe v. Waterloo Min. Co. 70 Fed. 455, 17 C. C. A. 190; Smith v. Hopkins, 120 Fed. 921, 57 C. C. A. 193.
>
> Rule 24 (188 Fed. xvi) provides the brief shall contain a specification of the errors relied upon, and in cases brought up by appeal the specification shall state as particularly as may be in what decree is alleged to be erroneous. There is a total

absence of any pretense of compliance with this rule, and the case can properly be affirmed, and the appeal dismissed for this reason. City of Lincoln v. Street Light Company, 59 Fed. 756, 8 C. C. A. 253; Woodmen of the World v. Jackson, 97 Fed. 382, 38 C. C. A. 208; Western Assur. Co. v. Polk, 104 Fed. 649, 44 C. C. A. 104." Walter Baker & Co. v. Gray, 192 Fed. 921-929.

In the case of United States v. Ferguson, 78 Fed. 103 (2 C. C. A.), at 105 it is said:

> "*The seventh assignment alleges as error that the court erred in rendering a judgment against the defendant; and the eighth, that the court erred in not rendering a judgment in favor of the defendant.* These assignments do not comply with the rules, as they fail to point out any particular error asserted and intended to be urged. Whether they mean that a wrong result was reached because the facts were erroneously decided, or because the court erred in applying the law to the facts, can only be conjectured. Grape Creek Coal Co. v. Farmers' Loan & Trust Co., 12 C. C. A. 350, 63 Fed. 891; Oswego Tp. v. Travelers' Ins. Co., 17 C. C. A. 77, 70 Fed. 225; Doe v. Mining Co., 17 C. C. A. 190, 70 Fed. 455." United States v. Ferguson, 78 Fed. 103.

In the case of Flagler v. Kidd, et al., 78 Fed. 341 (2 C. C. A.), the court said:

> "*The assignments of error are defective, because they merely state that the judgment should have been for the defendant instead of the plaintiffs, and that neither the complaint nor the findings state any good cause of action.*" They fail to point out any 'particular error asserted and intended to be urged,' as is required by the rule. As was said by the court of appeals for the Seventh circuit (Grape Creek Coal Co. v. Farmers' Loan & Trust Co., 12 C. C. A. 350, 63 Fed. 891), 'an assignment of errors cannot be good if it is necessary to look beyond its terms to the brief for a specific statement of the question to be presented.' See also Oswego Tp. v. Travelers' Ins. Co., 17 C. C. A. 77, 70 Fed. 225; Doe v. Mining Co., 17 C. C. A. 190, 70 Fed. 455."

In McFarlane v. Golling, et al., 76 Fed. 23 (7 C. C. A.), the court said:

> "By the second clause of rule 24 of this court (11 C. C. A. cx., 47 Fed. xi.) the specification of error in a case brought up by appeal is required to 'state as particularly as may be in what the decree is alleged to be erroneous.' There is here no specification which designates any particular in which the decree is supposed to be wrong or defective. The nearest approximation to it is the twelfth specification, which says, *'The court erred in directing a decree for the complainants without considering and providing for the just and equitable claim of the defendant;' but that is hardly less general and indefinite than the next specification, which is that 'the court erred in disregarding the equities of the controversy.'* It should not be necessary to look to the appellant's brief to learn the meaning of his assignment of errors. Grape Creek Coal Co. v. Farmers' Loan & Trust Co., 12 C. C. A. 350, 63 Fed. 891, and 24 U. S. App. 38."

In the case of Sovereign Camp, etc. v. Jackson, 97 Fed. 384 (8 C. C. A.), the court had under consideration the same method here employed and said:

> "Rule 11 is that each error asserted and intended to be urged shall be separately and particularly pointed out, not generally averred. None of the errors asserted in the argument, none of the questions of law or of fact there discussed, are pointed out in this assignment particularly or at all. Rule 24 requires the specification in the brief to state as particularly as may be in what the decree is alleged to be erroneous. *The statement and discussion in the argument of the questions to which we have referred demonstrate the fact that a more particular statement of the errors in the decree might have been made than that which was contained in the assignment, because such a statement was made in the argument. The assignment and the specification alike utterly fail to comply with the express terms of the rules. Nor are they more fortunate in serving the purpose to accomplish which these rules were made. Assignments and specifications of error were required for the purpose of informing the court and*

the counsel for the opposing party what questions would be presented for consideration and review in the appellate court. An assignment which fails to point out these questions—one which compels court and counsel to look further and to search the brief in order to discover them—entirely fails to accomplish the purpose of its being, and is utterly futile. The assignment and the specification in the case at bar are apt illustrations of such a failure. They suggest none of the questions of law or of fact which the argument contained in the brief presents for our consideration. City of Lincoln v. Sun Vapor Street-Light Co., 19 U. S. App. 431, 434, 8 C. C. A. 253, 254, and 59 Fed. 756, 758; Oswego Tp. v. Travelers' Ins. Co., 36 U. S. App. 13, 17 C. C. A. 77, and 70 Fed. 225; Van Gunden v. Iron Co., 8 U. S. App. 229, 248, 3 C. C. A. 294, 296, and 52 Fed. 838, 841; Grape Creek Coal Co. v. Farmers' Loan & Trust Co., 24 U. S. App. 38, 45, 12 C. C. A. 350, 353, and 63 Fed. 891, 894; Doe v. Mining Co., 44 U. S. App. 204, 214, 17 C. C. A. 190, 196, and 70 Fed. 455, 461."

In the case of Deering Harvester Co. v. Kelly, 103 Fed. 261, at 264 (6 C. C. A.), the court said:

"The second, third, and fourth assignments of error are mere general complaints that the judgment was rendered for the wrong party. Such assignments are not such as the rule requires, and they present no question which we can recognize. The eleventh rule of this court (31 C. C. A. cxlvi., 90 Fed. cxlvi.) requires that the assignment 'shall set out separately and particularly each error asserted and intended to be urged; and errors not assigned by this rule will be be disregarded, but the court at its option may notice a plain error not assigned.' Railroad Co. v. Cutting, 16 C. C. A. 597, 68 Fed. 586; Doe v. Mining Co., 17 C. C. A. 190, 70 Fed. 455; U. S. v. Ferguson, 24 C. C. A. 1, 78 Fed. 103; Hart v. Bowen, 31 C. C. A. 31, 86 Fed. 877." 103 Fed. 264.

In the case of Lloyd v. Chapman, 93 Fed. 599 (9 C. C. A.), *this Court* said:

"In Doe v. Mining Co., 17 C. C. A. 196, 70 Fed. 456, this court said its purpose is 'to apprise the opposite counsel and the court of the particular legal points relied upon for a reversal of the judg-

> ment of the trial court; and, further, that 'the attempt to make the assignment of errors more particular in a brief is not proper.' 'It is in fact,' said the court, 'an attempt to amend the record in this particular without the permission of court."

We are thus met face to face with a charge that the court should not have dismissed the bill on the merits and should not have refused plaintiff relief. No attempt is made in the Assignment of Errors to point out wherein the court so erred, whether by erroneous application of law to the facts, or erroneous finding of facts, or failure to find material facts, or even failure to grant supposed sympathy; but the case is argued upon supposed principles of error as to conscience, both human and Divine, and law, flitting from earth to heaven like an air fleet dodging war projectiles. (See Appellant's Brief, p. 15.)

Attempted seggregation, in some instances, of both facts and law, exists in spots in counsel's brief; but there is not that sort of objections to the decree made in the assignment or specification, or that application of law to particular errors, that would, in the slightest degree, inform either counsel or court of the particulars of error claimed, either of fact or law in the decision below. We are not warned of any particular thing upon which to meet a controversy or prepare aid for the court. In such procedure counsel may be taken by the greatest surprise.

In conclusion, therefore, we think this an eminently proper case for the court to say that the time has about arrived for the defendant to be freed from further expense, annoyance, and wholly unfounded charges in one court after another, rather than to attempt to find a way around these rules. If error existed both counsel and court are entitled to know what, and where, it is. *We think this appeal should be dismissed.*

NOTE.

First, if the court denies the motion to dismiss, we shall find ourselves face to face with answering a brief

that we do not consider complies with, or gives a fair representation of, the facts, the rules of court or applicable law, or limited to the errors assigned. It is almost, if not actually, scandalous as to defendant in places. (Appellants Brief pp. 26).

In many of the instances claimed to be facts for appellant, no attempt is made to point out the pages of the record where the evidence may be found or the exception shown as required, or at all.

In many, and we might say most all, of the things stated as *facts* where the record is not cited, counsel may be excusable for the minor error of want of citations, because the citations do not exist; but we suppose this rule will relieve us from following up each half fact mixed with the fancy or fiction, and repeating the whole truth and pointout the fancy and fiction, if we point out the real facts succinctly and give the citations to the record so that the court can get the real truth as distinguished from the over-zealous fancy of our learned brother.

Second, there is such an imaginative argument, based upon eloquent hope, without that degree of fact, or record citations necessary to point *this Court* to the real truth, that we feel called upon to attempt to give the court the facts in the record, as distinguished from the visions in "Fairyland."

Third, we have not had sufficient time to make as clear and concise an argument as this case warrants, or the Court deserves in a case of this importance, but we shall have to ask the Court's indulgence in that regard, for we believe it ample.

Fourth, we do not wish to engage in any controversy with counsel as to whether his views of religion should be the controlling measures of this case, as he so frequently tenders in his brief; nor to cast any reflections upon his zeal or fervor, much less to criticise Holy Writ; but only to call

attention to the sort of religion that courts of conscience must apply on earth to prevent the destruction of dead men's estates and the pauperizing of their widows and orphans by fictitious stories of persons who regard it easier to concoct tales of dead men's conversations with which to loot their estates after the truth is sealed with their lips in death, than to create wealth by regular methods.

One of the opinions in the New York Court of Appeals, Ide v. Brown, 70 N. E. 101, puts a damper upon the sort of frenzy into which ambitious counsel can work themselves in behalf of such contentions, by the warning that it has previously indicated that such contracts are dangerous.

> "Such contracts are dangerous. They threaten the security of estates, and throw doubt upon the power of a man to do what he wills with his own. The savings of a life-time may be taken away from his heirs by the testimony of witnesses who speak under the strongest bias and the greatest temptation, with all the dangers which, as experience shows, surround such evidence. The truth may be in them, but it is against sound policy to accept their statements as true, under the circumstances and with the results pointed out. Such contracts should be in writing, and the writing should be produced, or, if ever based upon parol evidence, it should be given or corroborated in all substantial particulars by disinterested witnesses. Unless they are established clearly by satisfactory proofs and are equitable, specific performance should not be decreed. We wish to be emphatic upon the subject, for we are impressed with the danger, and aim to protect the community from the spoilation of dead men's estates by proof of such contracts through parol evidence given by interested witnesses."

The defendant seeks such protection.

STATEMENT OF CASE.

DECISION BELOW. This case comes here on appeal from a decree refusing to grant the plaintiff any relief, (see Record of Decree and Opinion, Rec., p. 99114; see 224 Fed. 76), because):

1. She had once litigated the same case to final decision on a demurer interposed, among other causes, to the merits in the State Court in Minnesota when the estate in question was probated.

2. After a careful examination of the pleadings and a full taking of the evidence and careful study of the witnesses and their demeanor and versions, as well as the documentary evidence, the Trial Court concluded that there was no merit in plaintiff's case on the facts, as the Minnesota Court had concluded on the demurrer.

It was our contention below, and is our contention here, that no reasonable ground exists for upholding plaintiff's contentions as a matter of equity; but that the merits cannot again be legitimately reconsidered, so long as the rule of *res adjudicata* of *this Court* exists, or so long as the "Full Faith and Credit Clause" of the Federal Constitution, Article IV, Section I is *"read and believed."*

NATURE OF CASE AND APPEAL.

This controversy grows out of the estate of one Peter B. Smith. See Complaint Rec. pp. 2-24. The plaintiff, who has been twice married and has two sons, none of whom are related to him or to defendant, brings this action to have the defendant declared a trustee of two-thirds of the estate of Mr. Smith, one-third for plaintiff and one-third for her sons, upon the theory of an alleged oral agreement with Mr. Smith that the property should ultimately so go. The defendant was the wife of Mr. Smith at the time of his death; he willed all of his estate to her absolutely; she was made the executrix in his will; she probated the estate at Minneapolis, Minesota, where Mr. Smith lived at the time of his death, and without any claim of heirship being made in the Probate Court (see Statement of Admissions, Rec., p. 204).

About five months after the Probate Court had decreed the property to defendant, plaintiff brought action in the

State District Court of Hennepin County, Minnesota, in 1908 (Rec., p. 49), that being the State Court of general jurisdiction both at law and in equity (Rec. p. 92); the first case was brought in the State District Court at Minneapolis, Minnesota; a demurrer sustained to the complaint upon the merits, with privilege of pleading over; appeal was taken and time to replead passed and judgment was entered for defendant sustaining the demurrer and giving costs of $7.50 against the plaintiff; an appeal was taken and abandoned (See Exemplified Record attached to Answer, Rec. pp. 49-90).

The defendant moved to Portland, Oregon; six years elapsed; a new action was brought for the same purpose and upon the same theory (See New Complaint, Rec. p. 224). The former judgment is pleaded in bar; a plea to the merits is also made; also that if any claim existed, it was barred by not being proven in the Probate Court and by estoppel and laches; the public policy of Minnesota is inrevoked, (See Answer pp. 25-39).

The Parties and Their Marriages.

The defendant was the third wife of one Peter B. Smith, who married him on the 14th day of May, 1902, at Fargo, North Dakota, (Rec. pp. 204-5), and immediately went to live with him at his home in Minneapolis, Minnesota, where she continued to reside as his wife until the 16th day of August, 1907, when he died leaving the will in which he gave to the defendant all of his property both real and personal (Rec. pp. 205-6). After the first litigation was over, defendant married Mr. Guy L. Wallace, with whom she now resides, in Portland, Oregon.

The plaintiff is no relative of the defendant, either by blood or law, but was the step-daughter of Peter B. Smith because she was the daughter of his second wife, Mrs. Lilly D. Ailes, to whom Mr. Smith had been married on July 12, 1893, after Mrs. Ailes had been divorced from Lyman D.

Ailes, (Rec. p. 205), plaintiff's own father who is still alive and the plaintiff and her two sons now reside with him,

Her mother had died on June 12, 1900; prior to that time, the plaintiff had been called by the name of Smith a great deal of the time and Mr. Smith had called her his adopted daughter; but she and her mother had refused to allow Mr. Smith to adopt her because they thought her own father's mining interests in Alaska might be cut off, (Rec. pp. 167-170). Counsel and court agreed at the trial that adoption was not claimed, (Rec. pp. 167-170). Under her own name, she had gone to Europe with her own father, Mr. Ailes, and was married in London, under her own name, to one Donald MacLean, a surgeon in the United States army, without telling her stepfather of her intention to even become engaged, and from that marriage there was an issue of the two sons mentioned in this case, and for whom the plaintiff claims one-third of the Smith estate.

Prior to the death of her own mother she had been living away from Minneapolis with her husband and they both came to live with Mr. Smith. She was divorced from Donald MacLean on January 9, 1902, in a suit instituted in the fall of 1901, in Minnesota, (Rec. p. 257), but not until she concluded that he could not support her, (Rec. pp. 241-2). In the trial of that suit she and Peter B. Smith were the only witnesses to give evidence and the state court at Minneapolis, that tried that case, found, as a fact, that she and her husband, Donald MacLean, had come to live with Mr. Smith, under an arrangement by which she was to be his housekeeper and live at the expense of Mr. Smith for herself and the family, while Dr. MacLean should attempt to establish a private practice in medicine there, and that that arrangement was made *to continue over one year*, (Rec. p. 257).

The plaintiff and her two sons continued to reside with Mr. Smith at his home in Minneapolis where he lived and

kept a housekeeper who was sort of girl of all work, (Rec. p. 562), and he treated her as one of his family as long as he could put up with her ways, (See Record of his letter, p. 597), and until some time after.

In August, 1905, after plaintiff and her boys had been living in California for some time, she married one Edwin J. Price, the only son of a dry goods merchant in San Jose, California; he lived eight years longer than Mr. Smith and died in 1914.

The Pretended Issues.

Counsel challenges the findings and decree of the court below upon four alleged errors:

1. Dismissing plaintiff's bill.
2. Denying the relief of her prayer.
3. Refusal to admit in evidence a letter, Exhibit F, in private correspondence wholly between outside parties and with no authority from the defendant.
4. Refusal to receive an inventory of Mr. Smith's estate until such time, if any, as an accounting should be found proper.

The first two alleged errors are supposed to raise the point that the court should have found for plaintiff and given the relief for which she asked, instead of for the defendant. The second two will be treated in their order.

As We See the Issues.

But, as we view the situation, if the court considers the alleged merits, there is a preliminary question of both fact and law, namely:

Does the Minnesota Judgment Preclude This Case?

We therefore feel that a compliance with Rule 24 of all circuits (150 Fed. XXXIII), has not been followed, but we are left in that uncertain position that requires us for safety to present both facts and law, if *this Court* shall compel us to treat the case as if there had been a proper Assignment

of Errors, but at the disadvantage of having no definite points to controvert, and the chance that the court may not have proper light upon the right questions.

Under the facts the decree was undoubtedly correct and should be supported as against appeal upon the following principles:

1. That this whole matter has been concluded by the Minnesota decision on the facts and the law given hereafter.

2. That there never was any arrangement in fact such as plaintiff claims with Mr. Smith or defendant, and that she got from him and his estate all that he ever expected her to get, and that further claim upon him and defendant was entirely an after-thought which did not comply with either the law or equity of Minnesota or of this jurisdiction.

3. That the decree was right in principle and amply supported, in fact compelled, by the evidence in this case, as well as the law.

4. That the alleged errors of rejection of evidence are not meritorious.

In this order we shall state the facts with some argument interposed as to plaintiff's claim.

But it is at once observable that these are but general statements as we have not been challenged to particular errors, but blinded by supposed seggregated decisions in Appellants' Brief, as illustrated at page 73-83.

THE TEST.

As said by this court in Migeon v. Montana Cent. Ry. Co., 77 Fed. 249-252:

> "In the consideration of such specifications of error the general rule is that, in equity suits tried before the judge without a jury, the appellate court ought not to reverse the case merely upon the ground that the judge received irrelevant testimony, or that he rejected testimony that was admissible, where, upon all the facts and circumstances of the case, it is clearly apparent that the

result would not have been different if the testimony objected to had been rejected in the one case or received in the other. Bank v. Greenhood (Mont.) 41 Pac. 251, 267, and authorities there cited; Scroggin v. Johnston, 45 Neb. 714, 64 N. W. 236, 238, and authorities there cited; Holmes v. State (Ala.) 18 South. 529. The controlling inquiry in such cases is whether there is sufficient competent evidence in the record to sustain the decree. Grayson v. Lynch, 163 U. S. 468, 476, 16 Sup. Ct. 1064, 1067. In Mammoth Min. Co. v. Salt Lake Foundry & Mach. Co., 151 U. S. 447, 451, 14 Sup. Ct. 384, 386, the court, in considering assignments of error in the admission of evidence, after quoting the language of the territorial court that: 'These errors are not available in a case in equity, for the chancellor is supposed only to act on proper evidence.'"

No change in result.

Result—Williams v. Breitling Metal-Ware Mfg. Co., 77 Fed. 287 (C. C. A.).
Engelstad v. Dufresne, 116 Fed. 582.

I.

IDENTITY OF CAUSES OF ACTION IN BOTH CASES.

The issues in this case involve the merits of the same transaction decided adversely to plaintiff on demurrer, in the Minnesota case as is conclusively shown by the Judgment Roll and the evidence of that case and the pleadings in this case.

See Judgment Roll Record pp. 48-93; Evidence of W. A. Lancaster, Rec. p. 572-82; Pleadings in this case p. 2-43; Court's opinion in this case, Rec. p. 94.

In the *case* brought *in which a demurrer was sustained* to the complaint in the Hennepin County District Court, Minnesota, an exemplified copy of the Judgment Roll, in which is attached to the answer herein, and *in this case the gravamen of the respective charges is in substance the same,* although there is a slight amplification of detail and one or two slight variations as to dates; but in each case the same issue, the same evidence, the same causes of action,

the same parties cannot be disputed as will appear from the respective similarities following:

a.

In the first complaint, paragraphs 1, 2 and 3 (Rec. pp. 49-50), in effect, sets out that the plaintiff was 29 years of age and the only child of Lyman Ailes and Lillie D. Ailes, who were divorced prior to the 12th day of July, 1893; that Mrs. Ailes, on the 12th day of July, married Peter B. Smith, and lived with him until her death; that from the time of that marriage and until the marriage of the plaintiff with Donald Maclean, she lived with her mother and step-father as a member of the family and at the request of them abandoned her name of Ailes and adopted that of Smith; that while she was living with them she

> "was loved, cherished, cared for, provided for, reared, educated and treated in all respects by her mother as daughter ought to be treated, and by her step-father in all respects as if she, said plaintiff, were the natural daughter of said Peter B. Smith, and as a daughter should be treated by her father."

In the complaint in this court (Rec. p. 2-24), approximately six years afterwards, we find that she simply adds six years to her age, and that the other allegations as contained in paragraphs 3, 4 and 5 cover the same grounds as those in the first complaint, with a few additional amplifications thrown in by way of inducement intended to indicate that Mr. Smith had brought the plaintiff up to a life of luxury, *and this complaint is so worded as to try to avoid the fact that she had been properly educated, as is evident from the allegations of the first complaint.*

It is evident that there is no dissimilarity upon these allegations such as would distinguish one case from the other in the line of evidence or the proof or anything of that sort; nor is there any reason why the first case should not have been shown, so far as material, without these added

allegations. None of them go to the question as to whether or not there was a contract. They only go to the attempt to show some additional reasons to try to make the alleged contract probable.

b.

In the first complaint (Rec. p. 50), it is alleged that plaintiff married Donald MacLean on 20th of February, 1899; that on the 8th day of January, 1902, she was divorced from him; that on the 21st day of August, 1905, she married Edwin J. Price, and that they were still husband and wife at the time that action was brought; that there were two sons as an issue of the first marriage, Donald, Jr., born March 8, 1900, who was then eight years old, and Robert Maclean, born July 9, 1901, who was then seven years old.

In the present complaint (Rec. p. 5), in paragraph 6, she pleads that she married Mr. Maclean on the same date in London where she had gone for a visit, with the knowledge and approval of Peter B. Smith; that of said marriage there were two children, Donald, Jr., born at Honolulu, March 8, 1900, and Robert Maclean, born at Minneapolis, July 8, 1901.

It is evident that these are the same allegations; but the second complaint was so worded that a casual glance might indicate that Mr. Smith consented to the marriage or that at least he consented to her going to Europe at the time she married Maclean. This, of course, is a forced attempt to cast a little more responsibility upon Mr. Smith, for all of the acts which the plaintiff performed, but there is no difference in the evidence, no difference in the allegation, no difference in the complaint which could cause any variation; besides, these things do not go to the gravamen of the charge, but rather go to show that she herself knows that it would not have been carried out by herself, if such arrangement had been made.

There is nothing, therefore, in this element of the sec-

ond complaint which could prevent the binding effect of the former judgment.

c.

In the first complaint in paragraph 5 (Rec. p. 51), the plaintiff pleads in effect that in or about the month of October, 1900, she was living in the house and home of Peter B. Smith and he contracted with her in effect that she should remain and live with him during the remainder of his life in his house and home and treat and regard him as if he were her natural father, and love and care for him as a natural daughter ought to do, and keep her son, Donald, with them during the remainder of Peter B. Smith's life-time, and to take up and assume all of the cares, duties and responsibilities of a housekeeper for said Peter B. Smith during the remainder of his life; to be mistress of his house and home, and do all things in that connection required of her by him during his life; that he would support them as if she were his daughter, including a promise to love her as if she were his daughter and to love Donald as though he were the grandson; that he would furnish and provide a home for her and Donald with himself during the remainder of his life and provide and satisfy all of their wants and necessities, treat and regard them as though she was his own and natural daughter for and during the remainder of his life-time, and regard the boy as if he were a grandson, and that he would give, devise and bequeath to the plaintiff, at his death, the whole of the estate of which he should die possessed, and that by his last will and testament he would make the plaintiff his sole and only heir, devisee and legatee.

In the second complaint (Rec. p. 5), paragraph 6, again trying to get further inducement, she sets out where Dr. Maclean was stationed after he was married to her, and that when her mother took sick she returned to Minneapolis and helped nurse her (as if that were unusual for a

daughter); that she rejoined her husband in Honolulu and that Mr. Smith and her mother visited Honolulu, while her mother was ill from cancer; that they afterwards returned to Minneapolis and kept up a correspondence with her and that Mr. Smith urged Maclean to resign from the army and come on to Minneapolis, to be with them, in the hope that it would prolong the mother's life; that accordingly Maclean did resign, and that he made certain remarks about being much attached to her and the son while they were in Minneapolis, and while he was in a state of depression; it then sets forth that in October, 1900, Dr. Maclean had become dissipated and became involved in some affair, the particulars of which were never known to her, but that he left hurriedly; that she was ignorant of his whereabouts, but is now informed that he went to Mexico and finally to Nevada and married again and has built up a medical practice; that at the time when Dr. Maclean was in this difficulty in October, 1900, and was about to depart, she wanted to go with him and take Donald; that she was then pregnant with the second child which was born on July 6, 1901; that Maclean and Smith advised and urged her that she remain at Mr. Smith's house; that Mr. Smith then told her that Maclean was not a fit man for her to go away with and that she should give up all thought of ever living with him again, and advised her to bring a divorce action which she brought, and obtained a divorce in the courts at Minneapolis; that at and after the time when Maclean left they agreed that if she would remain at his home with her son Donald, and such other children as might be born to her (of course she could not then know that another would be born) and treat and regard him as her own father, care for him in his declining years, manage his household, be his housekeeper as if she was his daughter, he would care for and support her and her children as if she were his daughter, and her children

his grandchildren and at his death he would leave to her for herself and her children all the property which he might then own, but that if she refused to do as he advised and urged and went with or followed Maclean, that Mr. Smith would cast her and her children off and leave none of his property to them; that she had great confidence in him and respect for him and believed that what he told her was true and accepted the proposal and agreed to carry out the transaction.

There is no particular fact in connection with these alleged agreements in this case which could not have been proven in the other case, and indeed, it is doubtful if as much could be proven in this case as under the former complaint.

d.

In paragraph 6 *of the first compaint* (Rec. p. 53), it is alleged that pursuant to the agreement, the plaintiff entered upon the performance thereof and continued thereon until a short time after the marriage of said Smith and the defendant; that Smith, himself, pursuant to the agreement, performed it until a short time after his marriage with the defendant, which in the first complaint, she alleges, was in the mouth of June, 1902. *In this complaint in the* 10*th* paragraph, she alleges that in October, 1900, and pursuant to the agreement immediately thereafter, they entered into the performance of that agreement and that he introduced her as his daughter to some of his friends and called the boy his grandson, and that they both continued to perform that agreement until the modification thereof.

Of course there is nothing different in this.

In the 8*th paragraph of the first complaint* (Rec. p. 54), it is alleged that shortly after the marriage between Mr. Smith and the defendant that Mr. Smith *dismissed and discharged* her from her position of housekeeper and mistress of his home and installed the defendant therein, and that

thereupon they mutually modified their contract with the consent of the parties hereto, including Mrs. Smith, to the following effect:

That the plaintiff would release the agreement formerly pending so far as it related to furnishing and providing a house and home for her and her son, Donald, with him, and from his promise to keep and maintain the plaintiff as his housekeeper and the mistress of his home, and from his promise to give and bequeath to her his whole entire estate at the date of his death, and from his promises to make her his sole and only heir, devisee and legatee, and that she could go wherever she pleased, reside where she pleased, do whatever she wished to do, take her children wherever she might go if she desired to do so, and to support and maintain said plaintiff and her son as long as he lived, providing her with such sums of money as would be necessary and give, devise and bequeath at his death, to the plaintiff, one-third of his whole and entire estate for herself and an additional one-third of the whole and entire estate to her for the use and benefit of her two sons.

It is evident from this complaint that the basis of that complaint, so far as his estate was concerned, was a charge based upon this *alleged modified contract for an agreement* without any future performance upon her part, or the part of her children, to will two-thirds of his estate to them, and consequently there could not be any particular performance on their part to that agreement, for *there was nothing for them to perform.*

In the present action (Rec. p. 11), she alleges that in or about February, 1902, he informed her that he desired to marry the defendant and proposed to the plaintiff that she would be relieved, after his marriage, of the services which she was to perform under that agreement and have greater liberty for herself to travel, etc., as she pleased; that he would pay for the expenses; that they then agreed

to modify the agreement of October, 1900; that he would convey the one-third to her for her own use, one-third to her for the boys, and be permitted to convey one-third to the defendant whom he then proposed to marry, and that the contract was accordingly modified to that extent, and in consideration thereof, they proceeded under that contract; but there is nothing alleged as to anything that she has done since that modification which could lay any basis for specific performance. She does allege that in February, 1902, he stated the agreement to the defendant and she consented to it.

The only change in substance in this allegation is that it occurred before the marriage with the defendant, while it is alleged in the other case to have been immediately after. But this does not vary the nature of the claim.

f.

In the first case (Rec. p. 55), it is alleged in the 9th paragraph that on the 10th of January, 1906, the deceased, by his last will and testament, devised and bequeathed all of his property to the defendant and appointed her as the sole and only executrix of his will, and that on the 16th day of August, 1907, he died.

In the present case (Rec. p. 15), it is alleged in paragraph 15 that the deceased owned no real estate; that he made his will on January 10, 1906, wherein he bequeathed all of his property to the defendant and appointed her the sole executrix, and that he died on the 16th day of August, 1907, and a petition for probate was made on the 27th of the same month.

There is no variance in this record.

g.

In the first case (Rec. p. 56), it is alleged that on the 27th day of August the petition of probate was made, and that on the 23rd of September the will was admitted to probate and letters testamentary granted to the defendant, and

that the estate was wound up on the 12th of March, 1908.

In the present case (Rec. p. 15), in paragraph 16, it is alleged in substance that the estate was turned over under decree of distribution to the defendant; so that there is no particular variance in this.

h.

In the first complaint (Rec. p. 57), in paragraph 11, it is set out that Peter B. Smith owned certain property which is specifically mentioned, and which the complaint says is of greater value than the sum at which it was appraised, and that that was not all of the property.

A similar allegation appears in the present complaint (Rec. p. 19), in paragraph 17, wherein she alleges that the property must have been worth $150,000.

In fact, the first complaint had the same allegation, and the further allegation that it was worth in the whole $250,000, so that the estate, according to the second complaint, was worth less; the same evidence of course would have to be presented on the two of them.

i.

In paragraph 12 *of the first complaint* (Rec. p. 59), it is alleged that prior to the death of Peter B. Smith, he and the defendant entered into an agreement and understanding wherein and whereby it was agreed that he should devise all of his property to her, and that after his estate had been fully wound up under his will, the defendant would give and assign to the plaintiff for her use and benefit one-third of the property, and should give and assign to her for the use and benefit of her sons an additional one-third out of the estate.

It is also alleged in the 13th paragraph that the defendant knew all of these things, and that in or about the month of September, 1907, while the estate was being administered, plaintiff stated the substance of the alleged contract, and the alleged, modified contract to the defendant and

stated that the plaintiff intended to take action to enforce her claims; that defendant knew all about these things, and then stated to her that that had been arranged between her and said Peter B. Smith during his life-time, and that after the estate was wound up she would turn over his property, and that plaintiff need do nothing to carry out the matter in any court while the estate was being probated.

In the second action in paragraph 16 (Rec. p. 15) the same allegations in substance are made except that it is alleged to have been before the petition to probate, and it is alleged that she believed and relied upon them and did not take any steps accordingly, but that same allegation is contained in the first cause of action, so that there is no variation in this.

j.

In the first complaint, in the fourteenth paragraph (Rec. p. 62), the matter of the amount of property and value as appraised is set forth and it is alleged that after the defendant got all of the property she refused to execute the trust created by Peter B. Smith and refused to give or convey the property to plaintiff for the benefit of either of the alleged trusts, after the demand.

In the present case (Rec. p. 21), paragraph 18 sets forth in substance the same thing with slight variance so that with a few amplifications as to details and no substantial variations as to substance, the second complaint is the same as the first down to the prayer.

k.

THE PRAYER.

In the first complaint (Rec. p. 63), the defendant asks first for an accounting and in the second complaint she asks for that also.

In the first complaint (Rec. p. 63), she asks that the

defendant be decreed a trustee of all of the property of which Peter B. Smith died possessed.

In the second complaint (Rec. p. 22), she asks in a little different language that the plaintiff be decreed a trustee as of a two-thirds interest in the property, and that it be turned over to the defendant as the beneficial owner and in trust.

In the third place, and in the first complaint, the plaintiff asked that two-thirds of the property be decreed to be held in trust, and in the last complaint she asks for an accounting for those trusts.

In the fourth place, the court is asked to adjudge the value of the property of which said deceased died possessed, and also in the other sub-divisions she asked for an appraisal of the property and the profits and for a division thereof for the purpose of the alleged trust with a clause for general equitable relief.

In the last cause, they ask that the property be turned over to the plaintiff or to such new trustee as may be appointed by the court and for general equitable relief.

So that in substance and effect there is absolutely nothing in the second action which could possibly make any cause of action out of the complaint which did not state a cause of action in the first instance. The parites; the causes; the whole alleged gravamen are the same.

A demurrer upon four grounds was introduced, including the ground of want of a cause of action (Rec. p. 69). It was argued upon that ground (Rec. p. 575) with the admission that the alleged contracts were oral (Rec. pp. 574-5), and sustained by order (Rec. p. 70). An appeal was taken to the Supreme Court and dismissed (Rec. pp. 75-80) after our repeated efforts to get her to prosecute it if she desired to do so (Rec. pp. 78-9), and plaintiff was about to let the time to amend go by (Rec. p. 81), when the court refused to extend the time which had been originally granted (Rec.

p. 70), and no attempt was made to amend, because, as shown by this action, they had no further theory upon which they could replead, and a judgment was entered sustaining that demurrer which is the usual method in Minnesota (Rec. pp. 90-92).

II.

There Was No Agreement with Mr. Smith or with Defendant.

In spite of all the investigation we could make, there was not a scintilla of evidence we could discover, even looking toward a meritorious claim of plaintiff prior to the trial. This led us to believe that she would either never push her case, or come into court with a story intended to be so constructed as to be based upon events where there was no outside witness, and consequently claims that she hoped could not be overcome by facts that could be found.

She could not push such a case with any hope of success in Minnesota without evidence other than alleged conversations with the deceased for that state has the following statute:

> "Conversation with deceased or insane person—it shall not be competent for any person to an action, or any person interested in the event thereof, to give evidence therein of or concerning any conversation with, or admission of, a deceased or insane party or persons relative to any matter at issue between the parties, unless the testimony of such deceased or insane person concerning such conversation or admission, given before his death or insanity, has been preserved, and can be produced in evidence by the opposite party, and then only in respect to the conversation or admission to which such testimony relates." Rev. Laws of Minn. §4663.

The plaintiff, for some reason, evidently believed it necessary to so construct her story as to make it appear:

1. That Mr. Smith took her in as a fourteen-year-old girl and loved and cherished her and he was leaning upon her and her children for aid and comfort for loss of her mother after he had loved and won the defendant as his

subsequent wife (Appellant's Brief, p. 5); instead of revealing to the court the plain and simple fact that Mr. Smith married her mother and took in, and cared for, her mother's child until she went to travel with and marry in the presence of her own father Rec. 245-46); that he allowed her liberal treatment as a member of his family while she stayed (Rec. 247); that he subsequently took her in, and gave aid to her and her husband and children (Rec. p. 253) till after the dissipations drove the husband from his home (Rec. pp. 517, 521), and plaintiff's treatment of Mr. Smith reached a point where her conduct and treatment toward him caused him to tell his neighbors in tears (Rec. pp. 518-545) of her cruel wounds to him and his determination to stop doing for her (Rec. p. 517), when he appealed to her own flesh and blood to take her away and even offered to help stand the expense (Rec. p. 591), and did help her own father with her expense till she again married and had a husband to support her and her children, when he aided in buying them a home (Rec. p. 527), cut out such provisions as he had in his previous will for them (Rec. p. 585), and quit any regular aid toward them (Rec. p. 517). He had helped them to the point where he felt entirely released from further care, or further protection, except that he left as a final request the note of defendant and husband which he held against their home (Rec. p. 291).

In short, that he was a generous man who had this family thrust upon him by a disappointed marriage with no very satisfactory way to turn them loose even upon their own relatives, and naturally loved the children; but when a subsequent marriage of plaintiff enabled him to aid them in a new home and spend the most of the $10,000 he once intended them to have, he changed his will to leave his property to his wife who had helped to accumulate all above $40,000 (Rec. p. 470) and whom he had chosen to prefer to love and protect.

2. That he agreed to give all of his property to her and her two children and subsequently modified it to two-thirds (Rec. p. 213), to which defendant agreed (Rec. pp. 211); but of this there is no corroboration whatever; the unreasonableness of it is made clear from various undisputed facts; Mr. Smith's own conduct disputes it; every living witness to any portion of her tale is against her, and it is inequitable for her to thus loot a dead man's estate as against a widow whose good faith is not entitled to be questioned by any argument where reason has not run mad with envy.

Let us therefore proceed to examine these matters in detail as they are, and not as plaintiff would now claim them with visionary hope, and we find that the decision of the learned *trial court* is far from doubtful and not entitled to the sort of criticism found on p. 20 of Appellant's Brief.

1. As to the disposition of Mr. Smith toward the plaintiff, and her two boys as well, as they come into and departed from the scheme, we notice that there were the following periods:

a. The period from the marriage of Mr. Smith to her mother in 1893, till she went to travel and marry under the tutelage of her own father, Mr. Ailes.

b. The period from her European marriage till she came back to pay her last respects to her sick mother.

c. The period from the death of Mr. Smith's wife, when he gave them shelter in his own home, as long as he could stand her.

d. His attempt to get her under the care of her own people till Mr. Smiths' death and the distribution of his estate.

a. Relations of plaintiff to Mr. Smith from his marriage to her mother until she left his home and went with her own father, Mr. Ailes, to, and married in, London, England.

The complaint in question was not founded upon the theory or fact of adoption as will appear upon its face

The question was raised during the trial as to whether there was any intention to claim actual adoption and the attention of the court was called to the fact that a stipulation had been filed allowing the plaintiff to amend her bill to make such claim if she desired to undertake to prove it and that she did not make that amendment and that there was no issue upon it (Rec. pp. 167-169). And the court notified us to confine ourselves to the contract (Rec. p. 168); but allowed the plaintiff to go into the story which she wanted to tell about her treatment by Mr. Smith when her mother was first married to him, with a view of showing the relations between them, without attempting to make any liability outside of the contract (Rec. p. 169), uponthe theory that they should stand or fall by their complaint on the alleged contract.

No claim was made by plaintiff of any acquaintance with defendant until long after the first and second periods which we have mentioned, nor does she designate any claim based upon any alleged contract prior to her marriage with Dr. MacLean; but upon the contrary we asked her:

> "Q. There was no promise upon the part of Mr. Smith at the time you married Dr. McLean to make any contribution to you to support you and Dr. McLean, was there?
>
> A. No.
>
> Q. Nothing of that kind was brought up, was it?
>
> A. No." (Record, pages 216-7.)

The plaintiff claims, as we understand, that Mr. Smith treated her as a member of his family until he surrendered her to her own father at the time when she went, at the expense of her father (Rec., p. 178) to London, England, where

> "she married Dr. McLean before her return to this country and without Mr. Smith or her mother ever seeing or knowing Dr. MacLean."

We have made no claim at any stage of this case but that Mr. Smith was a generous man and that notwithstand-

ing the fact that the plaintiff had a father of her own, able to take her upon European jaunts as she says "he did" (Rec., p. 178), yet Mr. Smith treated her as well as a step-father could treat the daughter of the woman he married, and was as kind and generous to her as her conduct warranted while she lived at his home and the trial court so concluded as is evidenced by its opinion (Rec., p. 96), 224 Fed., p. 576.

The plaintiff had evidently concocted her story upon the theory that she could make a great impression upon the court, as to this particular period, by claiming that Mr. Smith told her the morning after his marriage to her mother, when she undertook to call him uncle, that she was to be his little girl and her name was to be Bessie Smith instead of Bessie Ailes from that time—she was then fourteen years old (Rec., pp. 170-171), (and presumably not small or weak-minded as will later appear), and that she used the name Smith at different times and under different circumstances; but on cross questions (Rec., p. 177), she admitted that she called her own father "Papa Ailes" and Mr. Smith, "Dad."

She undertook to say, in that connection, that Mr. Smith did not want her to go with her father to Europe (Rec., pp. 177-178), but that she was then nineteen years old and had finished her education and went to New York alone. She thought at Mr. Smith's expense, and met her father at New York, and on direct examination continued that this was in January, 1899; that she went to London at her father's expense with no other companion except her father; was married in London the next month to Dr. MacLean, whom she had met on the boat going over (Rec., pp. 178-9), and had become engaged to him "subject to my Dad's and my Mother's approval" (Rec., p. 180); but when she came to cross examination she admitted that her own father was at the wedding, (Rec., p. 245).

"Q. Did you ask his consent to the marriage?
A. I do not know if I asked his consent. I simply told him I was going to be married."
(Rec., p. 246.) (Weak-minded creature?)

Following that admission she admitted that she cabled back to her stepfather for money without telling him that she expected to marry, although she was planning to marry later, as she claimed, at her home, and had cabled for money to come home. (Rec., p. 246.) She denied that she had married before she had cabled for money, (Rec., p. 246); but she admitted, with much hesitation (Rec., p. 248) that instead of asking her mother and her stepfather for consent she had done as she did with her own father, told them that she had met Dr. MacLean and expected to marry him and hoped that they would not object. (The loving and obedient daughter and stepdaughter?)

She admitted that she told the wife of Mr. Smith's nephew, who was much at the house after she had her trouble with her husband, (Rec., p. 280), that Mr. Smith had wanted to adopt her at one time, as Mrs. Jessie Carey Smith, the wife of the nephew had testified, and that she and her mother had declined to allow him to do so for fear that they would lose such mining interests as she was entitled to inherit from her own father, from his Alaska ventures (Rec., pp. 283-84).

To sum up this period, then, plaintiff had started out with the claim that Mr. Smith had meant to treat her as his own daughter and have her change her own name and had supported her liberally—the money sometimes coming through her own mother (Rec., p. 249); but that she grew up to be nineteen and was offered by her father to be allowed to travel in Europe at his expense and under his name. She went and simply told father, mother and stepfather (who had generously treated her) that she had made up her mind to be married and that she had declined, as

shown long thereafter, to become the adopted daughter of Mr. Smith.

b. The period from her marriage to Dr. MacLean in London until the death of her mother.

After she was married to Dr. MacLean in London and with no promise on the part of Mr. Smith, as she states (Rec., p. 246), to support them, she went with Dr. MacLean, who was an army surgeon in the United States army, around to various points where he was stationed in the army (Rec., p. 247). While she was married to Dr. MacLean and stationed at Honolulu, Mr. Smith and her mother visited them. Her mother was suffering from cancer and wanted to go over to see her she thought, more than she did for her health and tried to work in, in that connection, that Mr. Smith wanted to go also, (Rec., p. 250). Mr. Smith or her mother had never been to Honolulu before, (Rec., p. 251).

It is therefore evident that during this period there was nothing in which there was any unusual service or love or consideration or promise or agreement between these parties for any such unnatural contract as plaintiff claims.

c. The period when Mr. Smith gave shelter to the plaintiff as his housekeeper and her husband and the oldest boy, and subsequently to the second boy, from the death of plainti's mother till her conduct forced him to send her away; also their relations thereafter till his estate was distributed.

Plaintiff did not like to admit but finally had to admit, (Rec., pp. 251-2), that after Dr. MacLean had resigned from the army and had come on to Minneapolis with her that she and Mr. Smith and the Doctor talked over the question of his starting in private practice and that it was finally understood by all of them that he would undertake to establish a practice. She did not like to admit the cold fact that Mr. Smith had told them that if they wanted to stay there and allow Dr. MacLean to attempt to establish a med-

ical practice in Minneapolis that Mr. Smith would employ the plaintiff as his housekeeper and pay enough for her and the family to live on there with him and let Dr. MacLean have everything he could earn upon which to start his medical practice; but preferred to put it in a different way to make it appear that Mr. Smith had insisted upon their staying instead of telling them, "if they wanted to stay."

She admitted that the household expenses were to be paid and that the doctor was to start his practice and said she did not think there was any time limit placed on that matter, (Rec., p. 253.) In order to set her right upon the facts, we started in, (Rec., p. 254), to refresh her memory as to the fact that she and Peter B. Smith both gave evidence in her divorce proceedings, which was tried in the spring of 1902, upon a complaint filed in the year 1901, but her memory was very poor about the evidence that was given in that trial, (Rec., pp. 254-55), and when the allegation in her own divorce complaint which did not have the limit of time as to the arrangement of Mr. Smith, but told of the arrangement, was read to her, (Rec., pp. 255-6), she said:

> "It sounds rather familiar; but as I say, I never read the whole thing,"

and her attention was called (Rec., p. 256), to the minutes and evidence of the clerk of court, (Rec., p. 256), to show that she and Mr. Smith alone gave testimony in that case and the court admitted Exhibit "I," which was the complaint in the divorce case, (Rec., p. 256) in evidence, together with the judgment roll.

We then called her attention to the fact that the findings of the court in that divorce case in which she and Mr. Smith alone had given evidence were to the effect that she and her husband had gone to live with Peter B. Smith in June, 1900, for *one year* from that date, to be supported by him without expense to the defendant, who was to engage in the

practice of medicine and surgery and have all of the income which he could make during that time, (Rec., p. 257). She side-stepped the knowledge of this arrangement as to limit of time and undertook to explain that possibly she was not told of it, but admitted that at the time when that action was pending on the 8th of January, 1902, when these findings were made, she was residing in the home of Peter B. Smith, acting as his housekeeper, and that in addition, he had a maid known as Emily Carlson, who did the general work and was quite competent and sometimes did the ordering for the table, as the plaintiff herself was not accustomed to taking part in housekeeping.

> "Q. You had not been accustomed to keeping house in your mother's lifetime? A. No.
> "Q. You were not accustomed to planning meals? A. No. (Rec., p. 257.)

The complaint in this case charges that the alleged agreement with Mr. Smith, for love, affection, etc., was made in October, 1900, (Rec., p. 90, par. 9), which of course takes no account of the fact that she was then in the employ of Mr. Smith under a contract that had not expired, at a smaller consideration and of which she offers no explanation except a forgetful memory. This finding of the contract is evidently the result of Mr. Smith's testimony and her own as well, long after she now claims the contract to will the property, was made. If either of them had ever heard of anything of that kind it would have gone into that decision —we could not locate any stenographic notes.

She claims, in her complaint, (Rec., pp. 9-15), that she had an agrement with Mr. Smith that if she would remain in his home with her son Donald and *such other children* as might be born of her pregnancy and treat and be treated as a daughter and grandchildren, respectively, that he would care for them as his own child and grandchildren and leave to her for herself and the children all the property which he might own at the time of his death, (Com-

plaint, Rec., p. 9). Her story upon this matter on direct examination is found at pages 211-213, wherein she undertakes to tell us that in June, shortly after the mother's death, (Rec., p. 190), it was decided between her and Mr. Smith and Dr. MacLean that she would stay there with Dr. MacLean and the baby and keep house for Mr. Smith. She tried to work in that her stepfather had insisted on her coming on to see her mother and she had insisted in her original story that this arrangement in June was to be a permanent arrangement.

> "Q. Was the conversation that you had about you and the doctor staying there permanently with Mr. Smith?
>
> A. Yes; that he had resigned, and he was to take up private practice in Minneapolis, and we were to live there." (Rec. pp. 190-191).

She then worked in that Mr. Smith was very fond of the baby. She then gives evidence to the effect, for her own counsel, that the relations between Mr. Smith and the Doctor were very cordial; but that later Mr. Smith objected to the Doctor's habits and they had much friction, (Rec., p. 192).

She had evidently forgotten, in connection with this original arrangement, that it was of the kind which the Minnesota court found at the divorce case and she continues upon her direct examination before discovering it, (Rec., p. 193), that Mr. Smith insisted that Dr. MacLean leave the city and refused to let her go with him while he had no home and no way to care for her, and she had no ticket to leave on, and that he said that she was his daughter and must stay with him; that she insisted upon going with the doctor until the last moment, but that Mr. Smith took the baby out of her arms and told her that if she was so foolish as to go with that sort of a man that she could not take the baby; that she stayed as the result, and the Doctor went and she remained with Mr. Smith until he married the defendant, (Rec., pp. 193-4).

Having thus, as she supposed, fixed a proper setting for her story, she tells us, beginning on page 195 of the Record, that when she was getting the baby ready for bed on the following evening, Mr. Smith came to the nursery and told her that she ought to be glad to be rid of such a man, as he would never be able to take care of her or the baby, but that she was Mr. Smith's daughter, and that her duty was to her father and to her baby and to keep up the home and look after Mr. Smith, and that if she would consent to leave the Doctor—divorce him—the better it would be for her. She then says that he was walking up and down with his hands behind his back and said that "if I would give him up entirely that everything he had would be mine when he had gone." She says that she told him that she thought the Doctor would be able to take care of her soon and would not give him up, (Rec., p. 196). She tells us, on page 197, that he kept asking her if she was going to give up the man and that she was pregnant with her second child, and that state of affairs continued until the fall, and finally, in April or May, 1901, she said to Mr. Smith: "All right, go ahead and get the divorce. He did. And then I accepted." The divorce was granted in January, 1902, (Rec. p. 256), and he was married to defendant in May, 1902, (Rec., p. 194) (Still arguing that her duty to him was greater than to her husband?)

Counsel tried to lead her on a little, (Rec., p. 198); but the court would not alow it and she proceeded to tell us what she did for Mr. Smith. After this alleged conversation:

> "Q. What your status was in the house?
> A. Why, I didn't do any housework, the manual part of it, at all. I simply decided what the meals were to be, and what was necessary for the house. I had a maid, whom my mother had trained, who then became housekeeper, the working housekeeper of the house. I had none of those duties.

Court: You managed the affairs of the house as your mother had prior to that time?

A. Well, yes, in as far as I could; but my mother had trained Emily; that was our maid. After that I went on as far as I could, as my mother had done." (Rec. pp. 200-201).

His fortune for such housekeeping?

Her story of the alleged contract was that given on pages 193-198 and the burden of her story there is that she wanted to go with the doctor when he left and Mr. Smith took the baby and said that he would keep it, and that she ought to be glad that she was getting rid of such a man and that her duties were to Mr. Smith as her father and to the baby, and that the sooner she consented to leave the doctor and divorce him, the better it would be for all of them. On cross-examination she admitted that she had no money to go with the doctor at that time, and of course no reasonable man would let her go off with a man who was running away, and take a baby, if he had to contribute money for her to go. The fact was she had no way of going. She tells us on page 197 that he again asked her if she was going to give up Donald and repeated it over and over again, and told her that when she did that everything he had would be theirs. Finally, she says that in April or May, 1901, she could not stand it any longer and she said, "Dad, all right, go ahead and get the divorce." She tells us on page 212 that Mr. Smith told her of the engagement and that of course nobody else could take her mother's place; that he needed a companion; that she was young and needed her friends, and more freedom; and that instead of all, she would have one-third, the boys would have one-third and the wife would have one-third, but that he had enough for all. I said.

"All right, and then we went to breakfast."

This, she claims, was the morning after the engagement. She tells us that on the previous night and after the engagement, the defendant was at their house, and she gives the account in this way:

"And owing to our lack of room, Mrs. Wallace was rooming with me—shared my room. She wakened me, if I had been asleep—anyhow I was awake. She came to bed. She took me on her arm and told me that my Dad had asked her to be his wife. She furthermore said that she knew how fond I was of Dad and how fond he was of me and the children, and that she would never interfere with us in any way nor come between me and my Dad. We had a long talk, and she said that I was young—I was too young to have the responsibility of having the house and taking care of the house, with the maids, with the babies; that she thought it was too bad that I had married so young—that I had never had a young ladyhood—that I had simply jumped from girlhood to womanhood; and when she married Dad and came into the house that I would have much more freedom and time to enjoy myself. I was very fond of her. I thought myself—I was glad at anything that would make Dad happy—I was glad; and when she was so nice about it, saying that she knew how close the relationship was between my Dad and myself and my babies, and that she would never interfere, why, I think I told her how glad I was in a way; that naturally it seemed odd to have anyone take mother's place, but that it was all—I was glad.

Q. Now, that was about all of the talk?
A. That was about all.
(Rec. pp. 211-12.)

She then tells us on page 229 that after the funeral she tried to have a conversation with the defendant at the defendant's house, but could not find any favorable opportunity, but one day they had a talk when they were alone on the porch and at that time the plaintiff knew the contents of the will. She had gone to the courthouse with her husband and looked it up, (Rec. p. 230). She said that she told the defendant that she had seen the will and was surprised that there was no provision for her and the children, and could not understand it, and the defendant said that she was surprised also and that she knew nothing about it, and supposed it had been made that way—it was short and very brief for business reasons, and that the defendant sup-

posed that the plaintiff was anxious to get back to her children, and

> "* * * that she knew the agreement, and that I could go back to California, and not wait for the will to be probated.
>
> Court: What agreement?
>
> A. Well, I presumed that she meant the agreement between my Dad and I that I was to have one-third and the boys were to have one-third. I took it to mean that, because I was speaking about the will, and said I was surprised that no mention had been made of us, or me. And that I could go back to California, back to Mill Valley, and she would send our share to us. That was all the conversation.
>
> Court: Did this will provide anything for you or your children?
>
> A. Not mentioned in any way.
>
> Court: You were not mentioned in the last will?
>
> A. Not mentioned. And I spoke of how surprised I was."
>
> (Rec. p. 231.)

In other words, the gist of her story is not that she was to render aid and comfort and love and affection to Mr. Smith, but that if she would divorce her husband who was apparently no good at that time, and remain there and look after Mr. Smith, he would give her his property, and there was nothing very definite about her method of acceptance; but she assumed that she was accepting that proposition when she would get the divorce. In other words, she claims that this matter was suggested to her a number of times from the time her husband left and that finally, when nothing very definite about it was said, she said:

> "All right, Dad, go ahead."

And she supposed it meant that she would get the property and that she thought possibly Jessie Carey Smith was present at the time. As it will be observed later, Jessie Carey Smith testified that she never heard of any such thing, as every witness did, who was implicated in any connection with the alleged agreement.

The gist of her story respecting why Mr. Price was sent

away and the alleged contract as a consideration for sending him away was as follows in cross-examination:

"Court: Was he in disgrace?

A. Why, yes.

Q. And he was threatened with prosecution, wasn't he, at that time?

A. Well, not publicly threatened.

Q. But privately? Privately threatened with public prosecution, wasn't he?

A. Well, I think that would be what Dad's words were.

Q. Now, after Dr. MacLean left Minneapolis, you expected to go to him for something like a year, didn't you?

A. Nearly that, yes.

Q. You kept in correspondence with him?

A. Up to the time that I wrote him that I would get a divorce.

Q. You understood up to that time that he hadn't been able to get anything to do to make a living to support you?

A. That is what I understood.

Q. Did you understand that he was in trouble at the time that you wrote him that you had decided to get a divorce?

A. I think at that time he was in trouble, though I cannot be sure.

Court: Did that trouble arise out of a transaction between your husband and your Dad—Mr. Smith?

A. Yes. But I didn't understand the first part.

Court: Did that trouble that your husband was in arise——

A. Yes, I think it did.

Court: Arose out of a transaction between Mr. Smith and your husband?

A. Oh, no, not the financial—not the money part.

Q. The money transaction arose between him and other people?

A. Yes, I don't like—I don't know that it was money transaction that brought him into trouble.

Q. Well, you finally concluded that Dr. MacLean wouldn't be able to support you and the children if you went to him, didn't you?

A. Yes, and I was tired.

Q. At the present time you are living on a fruit farm with your father?

A. I am staying there.

Q. You and the boys?

A. Yes.

Q. You have been there now something like a year?

A. Nearly a year.

Q. If I understand you correctly the talk which you say you had with Mr. Smith, when you say he urged you to get a divorce, and when you say the property matter was mentioned was before you filed your complaint for a divorce?

A. Yes.

Q. All of the conversations that you had with Mr. Smith respecting his desires to have you stay there were had before you filed that divorce complaint, were they not, except those that you say took place at the time of his engagement and subsequently? Now, is that clear?

A. No, it is not quite clear.

Q. I want to be absolutely fair with you. You said in your testimony that on a number of occasions Mr. Smith said that he didn't think that Dr. MacLean would be able to take care of you?

A. Yes.

Q. Am I right about that? You came to that same conclusion, did you not, as a fact, before you made your application for divorce?

A. Yes.

Q. Now, you say that Mr. Smith told you—you say in your complaint, in effect, that Mr. Smith told you that if you went with Dr. MacLean he would not contribute anything to your support; that is, Mr. Smith would not contribute anything to your support? Is that right?

A. Yes.

Q. If I understood you correctly a while ago, in your testimony, you said in effect that Mr. Smith told you that if you stayed there he would do something by you in a proper way?

A. Yes, if I would divorce the doctor.

Q. Did he only say that in connection with his statement that if you would divorce the doctor he would do it?

A. I wouldn't say that he used those very words invariably. He would change his way of speaking by saying, "Well, have you come to your senses and will give up this man—make up your mind to give him up?" He didn't always use the word divorce.

Q. Well, was all of this talk which you say took

place between you and Mr. Smith about what he would do if you did give him up had before the time when you filed your divorce complaint?

A. Not all the talk before. There was talk before I consented to divorce the doctor.

Q. Well, was there any talk about the property arrangement which you have mentioned after the time when you filed your divorce action and before the time when you say he announced his engagement to you?

A. Well, that was a thing that was more taken for granted, that he had changed very much since I consented to divorce the doctor. He asked if there was anything that he could do. He did everything in his power for me. And when I accepted the conditions that were made, I understood that that meant that when I gave up the doctor I should have everything.

Q. Well, now, at the time when you say you accepted was before you filed the divorce action?

A. Yes.

Q. Yes?

A. At the same time.

Q. And if you made any acceptance, then, of what you say was his proposition, it was before you started the divorce action?

A. Well, I think that when I started the divorce action was the same time that I accepted this proposition.

Q. You don't think it was after that that you accepted it?

A. I should think that the matter of accepting of divorcing the doctor would be accepted, I should think it would be the same time.

COURT: State what was done, what you said.

A. You mean what I said to my Dad?

COURT: Yes.

Q. We would like to hear that.

A. I told Dad all right.

Q. All right to what?

A. All right, I would accept it.

Q. Accept what?

A. His proposition to leave everything to me.

Q. Now, how did he put that proposition? I would like to have the exact words if you can give them.

A. I will give the exact words just as nearly as I can: 'If you will give up this man, I will leave everything I have to you when I am gone.'

I think those are very close to the exact words.

Q. Nothing said about his marrying again?

A. Nothing whatever at that time.

Q. Do you remember whether there was anybody present in the room when you wrote the letter to Dr. MacLean telling him that you had decided to get a divorce?

A. Why, I am not sure, but I rather imagine that Mrs. Smith might have been there. She was with me a great deal of that time.

Q. That is Jessie Carey Smith?

A. Yes.

Q. And not Mrs. P. B. Smith?

A. No. Mrs. Jessie Carey Smith."

(Rec. pp. 240-244.)

It is clear from this that she claims that the consideration for this agreement on one side was the agreement to get a divorce from the doctor. She admitted that Dr. MacLean was now contributing to the support of the boys, (Rec. p. 237).

The defendant admitted at page 317:

"Q. At the time when that conversation took place, and you told him that you had decided to get a divorce, Mr. Smith didn't say anything about a will, did he?

A. I don't remember.

Q. He didn't say anything about property at all, did he?

A. Why, I don't remember that he did, Mr. Mercer, just at that time.

Q. And you didn't say anything about it?

A. Why, I considered that that was it, when I agreed to what he asked.

Mr. Mercer: I will ask to strike that out as not responsive to the question.

COURT: You considered that a continuing proposition, and that you didn't accept until you had concluded to get the divorce?

A. That was when I decided to get the divorce, I considered that that was the—

COURT: The culmination of the contract?

A. The end of it.

Q. Well, now, there was nothing said at that time about a will or property, or anything of that kind?

A. I told you I didn't remember. It was hard for me to make up my mind; I was giving up a good deal; and when I decided to divorce the doctor, that was the only thing then I could think of. I don't remember the details that happened at that time.

Q. Up to that time Mr. Smith had never mentioned the word 'Will' to you had he?

A. Well, the word 'Will'—

Q. That is what I am asking—I am asking now.

A. Well, he may have mentioned the word 'Will.'

Q. Not in relation to his affairs and yours, did he, the word 'Will'?

A. I don't think he ever—I don't know, but I don't recollect the word 'Will' exactly.

Q. Now, you hadn't mentioned the matter of his will to him, had you, in the terms of will?

A. I don't think so." (Rec. pp. 317-18-19.)

And again at page 320 and 321:

"Q. As a matter of fact, the question of his making a will where the term 'will' was used, was never mentioned between you and Mr. Smith at any time, was it?

A. Well, it seems to me that on one occasion—I don't know as this is material here—you say using the word 'will'—it was not a word that was used frequently; but it seems to me that at one time when Dad was making the remark, insisting that I consent to divorce the doctor, that he made the remark—I cannot swear just how this was—that he made a remark that he wished I would make up my mind so that he could—I don't know whether he used the word 'will' or not—I cannot answer that.

Q. Now, he never said anything to you after he was married about any will?

Q. After he was married to the defendant?

A. About a will?

A. No.

Q. Never said anything to you after he was married to the defendant about leaving you any property?

A. No, I don't hink the question ever came up.

Q. And Mrs. Smith never discussed property matters with you after she was married, did she?

A. No, I think not.

Q. And she didn't discuss them with you before she was married, did she?

A. Only that night, as I told you, when she came back and told me that she was to marry my Dad.

Q. Yes, but what you said then had nothing to do with property, the way you told it. Did she say anything to you about property that night?

A. Well, I consider that the property comes in when she said she would never interfere between myself and my Dad, between my Dad and myself and the boys.

Q. You mean to say that she said the word 'property' that night in any sense?

A. I don't say that she said property.

Q. Or will, or anything about a will?

A. She didn't say property or will, but I understood it to mean that.

Q. Had you said anything to her so that you could have any reason for understanding that?

A. Had I said anything to her in what way?

Q. With respect to property?

A. I think not.

Q. Did you tell her that in any way, that you claimed to have any interest in Mr. Smith's estate?

A. Why, I don't think it ever came up like that.

Q. Anything of that kind, any other words that could possibly be understood as that?

A. Why, up to that time I don't think I had ever made any remark at all of that sort to her about the property. " (Rec. p. 320-321.)

She claimed on page 322 that she wrote to the defendant about the estate but she could not tell very much about what she said and indulged in probabilities. It will be observed later that the defendant got no such letter. When asked if the plaintiff had talked over the matter of her alleged portion of that estate with her own husband before she started on to Minneapolis, she said this:

"Q. Before you started on to Minneapolis, did you and Mr. Price talk over how much you were to have out of that estate?

A. No—before I left? Oh, you mean, when Mr. Price and I went to Minneapolis?

Q. No, when you went the last time?

A. No, Mr. Price and I didn't talk it over."
(Rec. pp. 324-325.)

And when asked as to whether she mentioned the matter to the defendant in the alleged conversation on the porch while she was in Minneapolis, she admitted:

"Q. You didn't mention property at all in the course of conversation, in any definite terms like one-third, or two-thirds, or the whole, did you, to Mrs. Smith?

A. In the conversation I had with her before when I spoke about the will?

Q. When you were on there to visit, on the porch?

A. I don't think that I did designate the amount.

Q. I think you said you stayed there in the house a week or two altogether, after Mr. Smith's death?

A. Altogether I think it was about that."
(Rec. pp. 325-326.)

So we have her story as to the alleged contract with Mr. Smith in the best way that she could put it, as an experience dactress.

In this connection we call the Court's attention to the following things:

1. The improbability that a man of Mr. Smith's experience as shown by this record who had been twice married and was still a young man would feel the necessity of trying to offer this woman inducements to stay there to be supported by him with her child, so that he could give them his all, when her dissipated husband was having to leave town as the evidence shows, (Rec. pp. 516-517), and she did not even have the money to go with him, is beyond comprehension, it seems to us, of any reasonable mind.

2. She has testified that her second son was born in July, 1902; that the proposition which Mr. Smith made to her to take care of her and her children, including the one with which she was pregnant, was made in the

previous October, and it needs no argument for any rational person to know that this limit of time precludes any possibility of the truth of that claim as to the second boy; neither of them could then know she was pregnant, and we showed that she discovered it afterwards.

3. When she comes to her cross-examination, she admits that Mr. Smith paid for a nurse for her children, (Rec. p. 260); and that what Mr. Smith did was to furnish her money to pay the bills at the house but that she could not remember that he gave her money for her and the boys to live, (Rec. pp. 270-274), as Mr. Smith told Mr. Lauderdale he did, (Rec. p. 516). She did not like to admit, as shown from her side-stepping, (Rec. pp. 284-288), that she was having a great deal of trouble with Mr. Smith after her husband left and before he was married to the defendant.

Jessie Carey Smith, who was the wife of Arthur Smith, the nephew of Mr. Smith, connected with the subsidiary companies over which Mr. Smith was general manager, was often at the residence of Mr. Smith during this period. Appellant claimed, at first, that the trouble between them commenced after he came back from his wedding trip with the defendant, (Rec. p. 265), and undertook, by suggestion, to make it appear that the strain was caused by the defendant, (Rec. p. 265); but was then forced to admit on the cross-examination the following things:

1. That in order to keep Mr. Smith from discovering that she had improperly used money left by him to pay the bills while he was on the wedding trip, the defendant instead of being harsh with her or cruel to her, had divided up her own allowance for some time after she came into the home, to help take care of matters for which Mr. Smith had paid her and the money which had been squandered by the plaintiff, but that it finally came to the point where Mrs. Smith's own allowance was too small and that Mrs. Smith saw to it that those bills were paid, Rec. pp. 264-268),

and in that connection she had written to a personal friend of hers, (Rec. p. 268), the letter which appears in the Record on page 271, portions of which letter we there read into the record:

> "Mr. Mercer: The first sentence that I wish to read is: 'Hevens, Kid, how I do miss you. I am the only one of my class here now.' The next is: 'You heard the song at the Coon Club, didn't you, "If Money Talks it Ain't on Speaking Terms with Me." Well, that is the case with my wife, also with Dad. You see he got a few bills of mine while I was gone and we don't speak now as we pass by.'
>
> The other sentence, which I want to change—I will see if we can agree on just how I shall put that—the gist of the other sentence, so far as I think it ought to go in the record, is that she states on Sunday, under the title 'Sunday,' that she is very unhappy, and sitting there crying then." (Rec. p. 271.)

2. She admitted that Dr. MacLean supported her prior to the time she went back to Minneapolis, (Rec. p. 271); and after she had left Dr. MacLean and after Mr. Smith's marriage, the latter gave her some allowance to assist her earnings on the stage, (Rec. p. 272).

3. At one time she seemed inclined to object to the idea that Jessie Carey Smith was brought into the house a number of times before the marriage of the defendant and after she began to have trouble with Mr. Smith to try to pacify them; nor did she like to admit that it was understood between her and Mr. Smith that it was necessary for her to get out and earn her own living; but wanted to put it upon the theory that she had gone to him and told him that she was unhappy there at the house, (Rec. p. 277); yet, she finally got down to the admission that Dr. MacLean had pawned some things from the house, and that she had pawned some things, which things came from her mother and which she claimed, and that it cost Mr. Smith considerable to get the pawn tickets back, (Rec. pp. 277-8). She did

not like to admit that even then Mr. Smith told her that it was not proper for her to remain there, but declined to remember that Jessie Carey Smith went with her to Mr. Smiths office to try to make it easier for her with him, yet would not admit that she had a direct understanding with Mr. Smith that she should pay the house bills and her bills out of what he gave her, but admitted that she paid some of them, (Rec. p. 275).

4. She admitted that when she commenced talking about going on the stage, she had already been considering other occupations. She said, (Rec. p. 276): "Well, there didn't seem to be anything else for me to do. The only thing I could do was dance." Does this look as if she understood that he was to always support her or her children or leave them his property? She admitted that she was very unhappy at the time; but did not like to admit that Jessie Carey Smith was called in to pacify Mr. Smith in her behalf and to try to get her to get him to give more money than he wanted to give, (Rec. p. 276).

5. She admitted writing Mr. Smith after she decided to marry Mr. Price, who was to be her second husband, (Rec. p. 285), to know if he would give her an allowance because Mr. Price was at that time working on a salary for his father, while Mr. Smith, for herself and her father, was giving $100 a month at the time and after that he gave her nothing as a regular allowance except $50.00 a month for the children until he helped them build their house, (Rec. p. 286), after which he made no regular allowance.

6. She admitted that she understands that her father was to pay one-half of that money which was paid to her in California by Mr. Smith? Why should her father be asked to do that? Rec. p. 284).

7. She first tried to get Mr. Smith to set her up in housekeeping and take the maid from his house and wife and pay all the expenses of her and her children, (Rec. p. 281),

and this was after she commenced to have difficulty with him. She admitted knowing something about his attempt, when she returned from the stage, to get her uncle and aunt in Ohio, Mr. and Mrs. Wright to take her and the children off of his hands and receive $85.00 a month from him, (Rec. pp. 281-2).

8. She admitted, (Rec. p. 282), that she understood more fully afterwards, that Mr. Smith got into communication with her father and informed him that something must be done about her, and the children, and arranged to make a contribution of $50 a month if her father made a contribution of $50 a month, to support her and the children away from Mr. Smith and that Mr. Smith paid the $100 a month and that her own father did not make a contribution; and again, (Rec. p. 287), that Mr. Smith raised the question, when she announced her intention of marrying Price, as to whether Mr. Smith should make any further contributions to her. She undertook to side-step upon the theory that she did not have all of the letters. We called her attention to one of her own letters, which she had introduced as "Exhibit C-6," under date of July 22, 1905, in which Mr. Smith said, (Rec. p. 595):

> "I do not suppose Mr. Price would want me to contribute to your support after you are married, but with the boys it is different, and I should say after your marriage it would be right for me to send you $50 a month for the boys, which I will be glad to do."

And in that connection he sent her a wedding present of $100, and after her marriage, he made no pretence of sending her a regular allowance. If he was treating her as a daughter Price could have had no objection; as an outsider, yes.

10. But after that, she and Mr. Price desired to build a home, and Mr. Smith loaned them some money to aid them in that connection, that she did not know of Mr. Smith's making any regular contribution to the boys after that,

(Rec. p. 290). She offers no explanation as to why she did not some time hint to Mr. Smith during all those times that she claimed to have an agreement with him. We see no explanation except that she never thought of any such claim until she found that there was no other legal chance for a claim.

Then follows the story that she came on to Minneapolis to the funeral; that the note, with the correspondence and the receipt given by her and Mr. Price for the same as a gift from Mr. Smith were given as shown by the record, pages 290-294, and the exhibits shown and numbered at pages 589-590, reading as follows:

A note in Peter B. Smith's handwriting dated October 15, 1906, stating:

> ("In the event of my death before the maturity of this note, it is my wish that it shall not be considered of any value, and returned to Mrs. E. J. Price as a bequest from me.
>
> (Signed) P. B. Smith.")

The receipt for that note given by plaintiff and Price (both of whom evidently knew that nothing more was expected), which was as follows:

> a. "Minneapolis, Minn., Sept. 13, 1907.
>
> Received of Mrs. P. B. Smith that certain promissory note signed by Edwin J. Price, in the words and figures following, to-wit:
>
> $2,000.00/100 "Mill Valley, Cal., Oct. 15, 1906.
>
> Five years (5) after date I promise to pay to the order of Peter B. Smith Two Thousand Dollars for value received with interest at the rate of 5 per cent per annum from date, and if the interest be not paid annually, to become as principal, and bear the same rate of interest. This note is negotiable and payable without defalcation or discount and without any relief or benefit whatever from stay, valuation, appraisement or homestead exemption laws.
>
> (Signed) Edwin J. Price.
>
> In presence of Elizabeth Smith Price.
>
> Geo. P. Wilson. Edwin J. Price."

12. In this connection, upon the evidence of Jessie Carey

Smith, who was perhaps closer to the two of them than any individual during the time it was claimed by plaintiff that this alleged contract was made, and being carried out, as her testimony appears in the record, pages 332-390, the story of plaintiff is refuted. She tells us how she was often at the house after the death of the plainti's mother, before plaintiff's second child was born, (Rec. p. 331); that she witnessed one quarrel between the plaintiff and Mr. Smith at his office inthe Chamber of Commerce, Minneapolis, where there was quite an unpleasant scene, before the marriage to the defendant, because the plaintiff had pawned certain things that had to be redeemed or lost, (Rec. p. 335); that at another time, after the marriage to the defendant, she was at Mr. Smith's home and he was discussing with the plaintiff the matter of her leaving and trying to earn her own living; that he had recited some of the things she had done that displeased him, and the plaintiff was present and the witness tried to pacify Mr. Smith in his feelings toward the plaintiff. Perhaps this can best be told in her own language:

> "A. He said that Bess had done many things that she should not, that she had displeased him in many ways, and been extravagant and wasteful, and even dishonest, in money matters with him; and that he couldn't stand it any longer. And then the question came up; something was said about her going to Chicago to see if she could find some way of earning her living; and P. B. said that he knew she would not be able to earn her living, at least from the start, and he would allow her $25 or $30 a month for her expenses while she was there. And I urged upon him that that was hard-l yenough for Bess, that she could probably not live very easily upon that amount, and told him that he should make it more. And he finally did say that he would allow her more, I think $40 or $50 a month, then he said he would allow her."
> (Record, p. 336.)

13. Jessie Carey Smith also testified that she was frequently in the house after the marriage to the defendant as

long as Mr. Smith lived; that she was there frequently before his marriage to the defendant and that Mr. Smith and the plaintiff did not appear especially fond of each other and she saw no special sign of any attachment between them, (Rec. p. 337). This witness, herself, was left with two small children dependent upon her and had been supporting them as a stenographer for years as her husband had gone away in 1905, (Rec. p. 338). This witness had gone to the station in the family automobile to meet the plaintiff and her husband when they came on to the defendant's house after the death of Mr. Smith, (Rec. p. 339). She had sent the letter and telegram telling of the death of Mr. Smith, as there was a telegraph strike down East, as she remembered it, (Rec., pp. 337-338), they would be a little late. She testified that she never, at any time during the lifetime of Mr. Smith, heard him or the plaintiff, discuss any property or will or any provision of property or will for the plaintiff or her children, (Rec. p. 339); and that he was not the sort of a man that ordinarily repeated his statements or kept on discussing them, but talked comparatively little, (Rec. p. 340). She was at the house more or less frequently after Dr. MacLean went away because Mr. Smith asked her to be with the plaintiff a great deal to keep her company, (Rec. p. 353); she was there at the time when plaintiff ascertained that she was pregnant and was in and out of the house for hours at a time. She lived not very far away, and went quite often with her husband and they were close friends of the uncle's family and talked confidentially; but in all that time she never heard from any of them, anything about any such arrangement as the plaintiff claims or anything of that sort; but apparently he was caring for her.

> "I understand P. B. was giving her a home there, that she had no other place to go and that he was giving her a home.
>
> Q. The matter of how to take care of her, what should be done respecting the family, etc., was

talked, was it, back and forth between you and P. B. and Arthur?

A. Yes.

Q. Did you see any indications during any of that time of Mr. Smith attempting to coerce her into doing anything like giving up Donald, or anything of that sort?

A. No, I never heard that; never heard that talked.

Q. Never heard anything of that sort?

A. No.

(Record, p. 355.)

She said that on one occasion she was there and plaintiff told her that she and Dr. MacLean were thinking of getting another house, (Rec. p. 356). If she was to stay forever, why did they want it? She said that after Dr. MacLean went away she frequently talked with plaintiff, and plaintiff told her she intended to go to him. The testimony in her own words is best given at pages 356-7:

"Q. You may state whether or not Bess talked with you on numerous occasions about intending to go to Donald after he left?

A. Oh, yes, she did.

Q. What did she tell you?

A. That she always intended to go to him. There was never anything else.

Q. Did there come a time finally when she spoke to you about getting a divorce?

A. Yes. She told me one evening at our home.

Q. Tell us what she said.

A. That she had made up her mind that she could not go to Donald and he would not be able to care for them; that he had gotten into further trouble out where he was; and we knew from what he had written that he had been in trouble out there and in jail; and that she could not go to him and that she intended getting a divorce.

Q. Was there anything said in that conversation as to whether Mr. Smith knew anything about her intentions up to this time about getting a divorce?

A. She hadn't told him then.

Q. She said—Tell us what was said.

Mr. Hallam: Do you know whether she told him then?

A. Well, I remember that I told her that she would better tell him about it if she made up her mind to it, and that she said she was going to tell him.

Q. Was that a short time before she applied for the divorce, do you recollect?

A. I dont know just—I don't know about that; it was, of course, before she applied for the divorce."

(Record, pages 356-357.)

Does this look as if she was induced by P. B. Smith to get the divorce for an agreement with him? She had gone to Europe against his will; had married there without his consent; had gone on the stage against his will; had concluded to get a divorce and had not thought to tell him.

Continuing her testimony, the witness said:

"Q. You may state to the Court, tell the Court what the situation was as to whether she always spoke kindly of Mr. Smith, or whether she nagged about him. Tell the Court what the actual situation was and whether you heard talks with her and Arthur about that matter, and what they said.

A. Why, I have heard Arthur cautioning her to be more considerate of P. B. and to treat him with more consideration; that he thought P. B. deserved it and it would be better all around for her to treat him with more consideration. And she was rather critical of P. B. to us, speaking to us about him and criticising him.

Q. This was before Mrs. Grahame came into the family at all?

A. Oh, yes ;this was before that.

Q. Did you see anything, in all your going back and forth to that household that indicated that the plaintiff was doing any special service in the home or looking after Mr. Smith especially in any way?

A. Why, no.

Q. Or doing any of the things that a housekeeper would generally do, in any particlar way?

A. Why, no; I don't think that I did.

Q. You spoke of being at the office at one time when the question of pawning things came up as between Bess and Mr. Smith. Was that before Mrs. Brahame was married to Mr. Smith?

A. Yes, it was.

Q. You spoke then of being at the house at a time when Bess was talking about going away, and Mr. Smith was talking about giving her a partial allowance. Was that before or after he was married to Mrs. Grahame?

A. That was after he was married.

Q. Do you know how that occasion came about?

A. Why, I remember that Arthur and I were over there and in the library with Mr. Smith and with Mrs. Smith and Bess; and P. B. was telling us about Bess and about her pawning these things, and he said that she could not stay there any longer, that she had been ungrateful to him and that she had been doing these things that he disapproved of and that he could not have her there any longer. Then was when the conversation came up, which I gave yesterday, about her going to Chicago.

Q. Well, now, did Mrs. Smith—that is the present defendant—did the defendant in this case take any part in that conversation that you recollect?

A. Not that part of it; no.

Q. Did she in any part of it?

A. Yes. P. B. was very angry because Bess had pawned her mother's jewelry, the jewels that had been her mother's, and he had—I think he had at that time—redeemed them, or else he had the tickets there or something of that sort; and he said that he should turn those jewels over to Dewey—Mrs. Wallace. And Dewey then spoke up and refused, and said that she could not have it that way; that she would not have it that way; that he must keep them; that some time he would feel like giving them to Bess again. That is all that I remember of her saying.

Q. Now, do you remember any other time when she took part in any of the controversies in any way at any time you were there?

A. You mean the defendant?

Q. Yes.

A. No, I don't believe so. I never heard any.

Q. Did you go in and out of the house frequently after she was married to Mr. Smith?

A. Yes, we were there.

Q. Were there often to dinner?

A. Yes, sir.

Q. And evenings?

A. Yes.
Q. And various times?
A. Oh, yes, sir.
Q. Did you ever see or hear Mrs. Smith enter into any of the controversies between Mr. Smith and the plaintiff at any time?
A. No, I never heard her.
Q. Did you have occasion to observe how she treated the boys?
A. Oh, always very nicely.
Q. You were there during the times when Bess was away on the stage?
A. Yes.
Q. And the boys were there?
A. Yes.
Q. In the care of Mrs. Smith?
A. Yes.
Q. They generally had a nurse?
A. Yes, they had a nurse.
Q. And did you at any time see any controversy between Mrs. Smith and the plaintiff in any way there?
A. Between Dewey and Bess?
Q. Yes.
A. No, I never did.
Q. Now, do you remember the /occasion of when you heard of the engagement between Mr. Smith and Mrs. Grahame?
A. Yes, I remember.
Q. Where did you hear that?
A. At my home.
Q. Who told you?
A. Bess told me.
Q. Who came with her over there?
A. Well, she and Dewey drove over together in the morning; I understood it was the morning after the engagement; and Bess told me.
COURT: Who were together?
A. Bess and Mrs. Wallace came over.
Q. Mrs. Grahame it was then?
A. Mrs. Grahame then.
Q. Drove over to your house together and told you about it?
A. Drove over to my house together.
Q. How did Bess appear that morning?
A. She was very much pleased about it."

Plaintiff's Evidence Does Not Corroborate Any Contract.

Plaintiff's outside witnesses show nothing as to any agreement.

William T. Price, plaintiff's witness, father of her second husband and the grandfather by adoption of the boys, had been a merchant in California; he knew these parties and was in the dry goods business there. He had also met Mr. Smith at one time when Mr. Smith was visiting there and at the time when Mr. Smith was returning from the Islands, (one trip which was in the lifetime of his wife who was the plaintiff's mother), (Rec. p. 128), although witness was inclined to think that it was after the San Francisco fire (Rec. p. 128). He said that Mr. Smith said the boys and Bess were well provided for (Rec. p. 130), and that he wanted to see that they had a good education and means to go into business; that if he lived he would see that that was done and if he didn't that they were well provided for. He said that he thought it was best to leave money in the hands of someone else who would use it in the proper way (Rec. p. 130-1); but he said that Mr. Smith said nothing in that conversation about Mrs. Smith and nothing more definite about his property than indicated above. That the witness' son wa sat that time the husband of the plaintiff and in the employ of the witness in the store. He did not think that Mr. Smith said at that time anything abou giving them a home or anything about the note or anything of that sort.

If this conversation were conceded to be absolutely true, it has no relation to any indication that money was left with Mrs. Smith or that she was made a trustee or that any such contract as the plaintiff claims was made; but from the fact that Mr. Smith had made no indications to anybody, so far as any of us could find after he changed his will in January, 1906, to the effect that he had, or would, or did, have provision for either the plaintiff or those children; and the fact that he had provided for their education in the previous will and had made her a liberal allowance and

was talking to a country-side dry goods merchant, under circumstances where the boys and the mother were the adopted family of the witness' son who was working on a salary, and was the only child as the witness states, (Rec. p. 133), of himself, the sum of $10,000 would have been a large sum and ample provision for the education of the children and the comfort and ease added to such a situation. The most of us have seen the time when we would have been glad to have received such an inheritance, and if this conversation ever took place, it is very likely that it took place before Mr. Smith changed his will in January, 1906, when the conditions were as the witness says he then described.

The story which Mr. Price tells could not have been true at the time he places it, for Mr. Smith had an outstanding will making no provision, conclusively shown to have been in force at that time; but a few months earlier and in the same winter, his previous will was outstanding with the provisions indicated.

This is no corroboration of any such agreement.

Plaintiff called Mrs. Hartzell, who had formerly lived in Minneapolis, and frequently visited the home of Mr. Smith, as she stated, but not often after Mr. Smith was married to defendant. The witness was a niece of the plaintiff's mother; their mothers had been sisters, (Rec. p. 153). She said that she never had any conversation with the defendant about the will, but she said that Mr. Smith had told her after the divorce that he would not have insisted upon getting the divorce if he had not intended to provide for the plaintiff and her boys. She also said that he told her that the marriage with the defendant would not make any difference; that Bess and the boys would be provided for just the same, (Rec. p. 149), but he told her later that he would have to find another home for the boys because they worried Mrs. Smith, and he intended to take care of them just the same, (Rec. p. 150), and that he hated to lose the boys; she said,

at page 151, that he told her that he intended to have the boys have a good education; she said that the defendant said she understood Mr. Smith's wishes and expected to carry them out with respect to the boys. This witness denied knowing anything about the arrangement by which the plaintiff came to live with Mr. Smith, page 156). She said that the plaintiff married both of the men she married before Mr. Smith ever knew them, (Rec. p. 158), and the conversation of which she spoke she said took place after Mr. Smith had been to the Hawiian Islands or Japan, (Rec. p. 159); she knew of Mr. Smith's trying to get her aunt to take charge of Bess and the boys, and they did not do it, but she thought there were reasons for it, (Rec. p. 159-60), but this testimony, if true, simply relates to the matter of Mr. Smith's provisions in his former will as is fair to conclude, and whether it does, or not, makes no basis for any such claim, or any corroboration of a claim such as the plaintiff makes in her complaint.

There is no evidence of any such corroboration in this.

Mr. Hartzell was the husband of the plaintiff; he had formerly lived in Minneapolis and knew Mr. Smith to be of the highest integrity. He stated that at the office of the defendant's counsel within a month or two after the death of Mr. Smith, he met the defendant and on coming into the room he said that he was very much surprised that Mr. Smith had made no provision for the boys and she expressed herself to the effect that Mr. Smith had left it to her honor to take care of the boys and see that they had a good schooling, and that she proposed to do it, but that she could do nothing for Bess then. This proposition, if admitted, would amount to nothing because as the evidence showed the defendant had learned after the death of Mr. Smith that he had cut out he provision for Bess, and in that connection, Mr. Hartzell, on cross-examination, was asked:

"Q. There was nothing said in that conversation about there being any contract of that sort, was there?
A. No, sir."

And the witness had admitted, (Rec. p. 141), writing a letter to us, which on his own explanation in the absence of the letter, in court, would naturally lead us to believe that neither he nor his family knew anything about this matter, and General Wilson, whom the witness thought was present in the room, and who had been examined before Mr. Hartzell's testimony by way of deposition, did not recall ever hearing of anything about any interests of the children, Mr. Hartzell also testified that the boys were playing on the floor at one time and Mr. Smith expressed himself as feeling toward them as he would toward his own children, and that, later, after the mother had gone away and left the children in the care of him and the defendant, Mr. Smith had told him that they were very trying to the defendant and he thought he would have to provide a home elsewhere for them, and talked with him two or three times about relieving Mrs. Smith of the care of them. This witness not only disclaims any knowledge of the alleged contract; but his testimony is entirely consistent with the main facts in the case that Mr. Smith had loved the boys and was caring for them at the time of these conversations and had made provision for them which he afterwards withdrew and was then having to make some arrangements to get them out of his family (Rec. p. 140).

Now when appellant's outside evidence was all in its result was that a pack of relatives anxious to see plaintiff prevail had been sworn to tell what they knew and none of them told of any contract, or even a promise or agreement to make any contract, to make any will, or anything of the sort, and nothing definite of her story was left.

Appellee's evidence showed that Mr. Smith never thought of any such tale as she told.

Exhibit 8 *is a letter found at page* 591 of the record written by Mr. Smith to E. A. Wright, an uncle of the plaintiff, on the 16th day of February, 1913, in which he appeals to the uncle to know if he cannot take the plaintiff and the children and allow Mr. Smith to pay $85 a month for their support. Counsel, in his brief, seeks to make much of this letter, (Appellant's Br. p. 11), on account of the expressed hope that Mr. Smith might provide for the suitable education for those boys; not that he had to provide for them, but that he should do so if he prospered at the proper time; but the significance of this letter is of the fact that speaking of the plaintiff and the children, he says:

> "* * * It now becomes a question of what to do with and for her and her children, the way she has treated me I can hardly be expected to take her back into my heart again, * * * She is evidently very sick of her present life and it seems to be a good time to bring about a change that would be to her advantage and that of the children. The question is, what to do and how to do it. * * Could you and your family find it in your hearts to take her and the children into your family and let me send to you each month, say $85, and you charge a reasonable amount for board to pay the balance over to Bess as she needs it to buy clothing for herself and children?"
> (Record, p. 591.)

He then proceeds to point out that he might say much more but

> "We could hardly think of taking her into our home and hearts again."

It is in this connection then that he says that it will make a big void in his heart to have the children go; but it seemed best and that if he prospered as he hoped to he expected to make suitable provision for their education,—*not give them his estate.*

It will be noticed in this connection that at the time that letter was written he had made the will which was then outstanding and appears in the record as Exhibit 1, page 585, under date of May 14, 1902, less than one year prior to

that time, and on the very day when he married the defendant in which he had provided that the plaintiff should have $5,000, as a bequest and that she and his wife should have in trust for the use and benefit of the children another $5,000 which they should use so far as reasonably necessary for the education of those boys.

He did not make his subsequent will, as will be noticed, until the 10th of January, 1906, wherein he removed those bequests and took out the bequests which he had made to his nephew of the membership in the Chamber of Commerce, (Rec. pp. 585-8), at Minneapolis and the reasons for these were evident.

Conditions changed. His nephew, Arthur C. Smith, had run away from his family and left his wife, Jessie Carey Smith, with two small children on her hands for her to support, (Rec. p. 338), he had, as appears from the facts above stated, become so estranged from the plaintiff that he could not longer have her in his home or expect to offer to take her back there again. He had appealed to her relatives to take her into their hearts if they could find a place, and they had not taken her, (Rec. p. 591). He had sent her to the Pacific Coast with the understanding that her father should pay $50 a month while he paid $50 and for a long time he had paid the full $100 himself, until she had acquired another husband, whose duty it was to support her; that he had contributed $50 per month to the boys after the marriage of their mother; and had helped her and her new husband build a home, taking their note for the balance which he gave to them by memorandum left therewith when he died and the children had, as counsel subsequently points out in his brief, a living father, who was becoming a prosperous doctor in Colorado and whose ties of kindred and manhood should lead him to assume his parental duties, and a large portion, if not all of the $10,000 originally provided in the will, had been used in the meantime for the benefit of plaintiff and her children.

Throughout all of the dealings between Mr. Smith and the defendant, there is not the slightest indication anywhere that he ever understood that he was under any obligation of any contractual nature to either the plaintiff or her children; and we have not been able to find any moral reason for his so feeling—he had discharged liberally the duties of a step-father and for it and those who came after him received not thanks but annoyance, expense, trouble, charges of fraud, and misrepresentation, with which counsel's brief so flagrantly glows.

In addition to the foregoing, there was the testimony of the respective witnesses for defendant, to the effect given under each that disproves her claims also.

1. *C. A. Brown,* the assistant manager of the St. Anthony & Dakota Elevator Company, who succeeded Mr. Smith as manager and who with Mr. S. C. Cook, (who had died before the trial), witnessed the will of January 10, 1906, giving all of the property to the defendant absolutely, (which will is Defendant's Exhibit 2, Rec. p. 587), was called with respect to the execution of that will, and testified:

> "Q. Did you and Mr. Cook sign that at the time Mr. Smith signed the will?
> A. Yes, sir.
> Q. Do you remember what conversation took place at the time, if any?
> A. *No conversation, as I recall; a simple statement from Mr. Smith that that was his will and he asked us to witness it.*" (Rec., p. 512.)

In other words, Mr. Smith's will was that his wife should have all of his property.

Mr. Brown also testified:

> "Q. You know Mr. Smith's reputation for business integrity?
> * * * * * * * * * * * * * *
> A. Yes, sir.
> Q. What was it?
> * * * * * * * * * * * * * *
> A. The very best."

2. *Geo. P. Wilson,* who had been admitted to the bar

in 1862, and was Attorney General of Minnesota from 1874-80 and had held various public positions, (Rec. pp. 496-497), had gone to Fargo, North Dakota, in 1880, to practice and had become acquainted, there, with Mr. P. B. Smith about 1884 or 5, subsequently moved to Minneapolis and was connected as counsel for Mr. Smith and various companies with which he was connected like the Elevator Company and the Chamber of Commerce, (Rec. pp. 498-9; he knew the parties and drew the will of Mr. Smith, and probated it for her widow as her counsel, and delivered the $2,000 note to the Prices and took their receipt, and never so much as heard of any such claim as here made until the estate was probated and defendant entered the suit to which the demurrer was sustained. He knew one of the witnesses, (Rec. p. 501), to the will made in Fargo on May 14, 1902, Exhibit 1, (Rec. p. 585), and that first will had been given over to him when the first suit was brought.

As to his connection with the last will and the whole matter his testimony is:

> "Q. Did you, as Mr. Smith's counsel, prepare that will?
>
> A. I did.
>
> Q. During any time of Mr. Smith's lifetime, in connection with the preparation of that will or otherwise, was your attention ever brought to any contract, or claim of any contract, of Mrs. Price, or "Bess," as you call her, in the estate of Mr. Smith—during Mr. Smith's lifetime?
>
> Mr. Jackson: Objected to as incompetent, immaterial and irrelevant.
>
> A. I have no recollection of any such thing.
>
> Q. Did you have any talk with Mr. Smith in which he told you anything about there being any arrangement that Bess should have any interest in his estate? Did you ever hear of that from him?
>
> Mr. Jackson: The same objection.
>
> A. Nothing further than a certain note that Peter B. Smith had taken for money loaned to Mrs. Price.
>
> Q. I have had marked 'Defendant's Exhibit 3,

S. K. P.,' what purports to be a letter from Ned Price to P. B. Smith under date of November 1, 1906. Below that, what purports to be a memorandum by P. B. Smith on the same page of the same paper, marked 'Defendant's Exhibit 4, S. K. P.,' and also a document on the reverse side of the sheet containing Exhibt 5, purporting to be a receipt by Elizabeth Smith Price and Edwin J. Price, for a promissory note under date of September 13, 1907; also a document on separate paper with a receipt containing the words in Exhibit 4, which is marked 'Defendant's Exhibit 6, S. K. P.,' and directing the witness attention to these documents, I will ask you, General, if you have seen those before, and if so, where?

A. Oh, yes; I saw them and they were in my possession—or our possession—in my particular possession.

Q. During the time that you probated the estate of Peter B. Smith in 1907, say during September from the date that Exhibt 5 bears, were they in your possession?

A. I think so; yes, sir.

Q. You may look at Exhibit 4 and tell us, if you know, in whose handwriting it is?

A. Exhibit 4 is in the handwriting of Peter B. Smith and his signature is attached to it.

Q. And on the instrument marked 'Defendant's Exhibit 5, S. K. P.,' I see as a witness 'George P. Wilson.' Is that your signature?

A. That is my signature.

Q. Made at the date of that instrument?

A. Yes, sir.

Q. And on Defendant's Exhibit 6, I show you the words 'George P. Wilson' and ask you if that is your signature, also made at the date of that instrument?

A. It is.

Q. I will ask you to examine Defendant's Exhibt 5 and tell us if you had in your possession at that time the note, a copy of which purports to be included therein?

A. I did have.

Q. Did it come into your possession in the handling of that estate, with the other paper?

A. It did.

Q. Now, I notice that Exhibits 5 and 6 contain the signatures of Elizabeth Smith Price and Ed-

win J. Price, as well as having your name as a witness. Were those signatures signed by those two people at the time you witnessed them?

A. They were, in my presence.

Q. You may tell us what took place at the time those instruments, Exhibits 5 and 6, were signed.

* * * * * * * * * * * * * *

A. They came to my office in the Security Bank Building, and the note was delivered and the receipts taken. That is all that I recollect.

Q. In accordance with those receipts as specified?

A. The receipts we refer to were taken at that time.

Q. Was there anything said by Mrs. Price at that time about claiming any further interest in Mr. Smith's estate?

* * * * * * * * * * * * * *

A. I don't recollect of anything of the kind.

Q. Do you recollect any expression of dissatisfaction or anything of that sort?

* * * * * * * * * * * * * *

A. I do not.

Q. If there had been do you think you would have recollected it?

A. If there had been anything specific, I think I would have recollected it, but I don't recall any expression of dissatisfaction. In fact, it was a very simple thing, simply delivered the note and took the receipts. I remember of having a little preliminary conversation with "Bess," as I call her, and as I know her, but that was simply in reference to our former acquaintance. I don't know that I ever saw Mr. Price before; I don't recollect that I did.

Q. Did you at any time during the probation of that estate, ever in any way have your attention brought to any claim of the complainant, Elizabeth Price?

* * * * * * * * * * * * * *

A. I might have had, but do not recollect it.

Q. When is the first recollection you have of ever having heard of any claim of any kind outside of this note?

* * * * * * * * * * * * * *

A. When the suit was brought.

Q. After the estate was probated?

A. Yes, sir.

Q. So that, as attorney for the estate in the probation, you did not know of any claim at all?

* * * * * * * * * * * * * *

A. I don't recollect of anything of that kind.

* * * * * * * * * * * * * *

Q. Were you acquainted with the business reputation of Peter B. Smith, that is, his reputation as to business integrity, during the years 1900 and 1902, 1904 and 1906, down to the time of his death?

A. I have never heard anything against his business integrity. In other words, his reputation for business integrity was good.

Q. You were acquainted with it, as I understand?

A. Yes, sir.

* * * * * * * * * * * * * *

Q. I will now ask you what that reputation was.

* * * * * * * * * * * * * *

A. It was good.

Q. You knew Mrs. Smith, who is now Mrs. Wallace, also?

A. Yes, I knew her.

Q. And during the time this estate was probated

A. Yes, sir.

Q. She was here in Minneapolis a good share of the time?

A. Yes, sir.

Q. And she was the executrix of that estate?

A. Yes, sir.

Q. And you were doing the business for her?

A. Yes, sir." (Rec. pp. 502-3-4-5-6-7.)

Col. Geo. D. Rogers, for years Secretary of the Chamber, testified that Mr. Smith was one of the prominent grain men and his reputation for business integrity was good, (Rec. pp. 509-511).

George K. Gibson, whose testimony appears at pages 392 to 402 of the Record, testified as to his relations with one of the companies of which Mr. Smith was the manager. He testified:

"Q. Generally speaking, he was the sort of man who listened and let other people talk?

A. Yes, sir; in all conferences by us, we would

all get in and argue, and then Mr. Smith would settle it.

Q. His expressions were very brief?

A. Short and decisive.

Q. And to the point?

A. Yes, sir.

Q. He was not accustomed to repeating himself?

A. And he was not accustomed to having anybody argue with him.

Q. He was not accustomed to repeating a proposition over and over in a business way, when you saw him?

A. I never had any such experience, and I never saw anybody that did." (Rec. pp. 392-3.)

Mr. Gibson also tells us, (Rec. pp. 394-5-6-9-400-1), how he himself was on his vacation at the time of Mr. Smith's death and received word from Jessie Carey Smith by telephone how there was trouble in getting telegrams through and how Mr. Bell and Mr. Dunwoody and he had arranged to get the president of the Soo Railway Company, Mr. Pennington, to use the dispatchers' wire and clear the line in order to communicate with Mrs. Smith at the Soo and try to locate the body which had gotten on to another train and ascertain when it would be possible to get the body to Minneapolis and that they were two or three days in doing this; yet, in spite of this testimony and the testimony of Jessie Carey Smith, and the testimony of the defendant, (Rec. p. 446), insists that the defendant and Jessie Carey had perjured themselves in explaining that Jessie Carey Smith was notifying various friends and that there was trouble on the wires and she telegraphed and wrote the defendant of the death instead of telegraphing her sooner —another illustration of how the sanctity of the home at its most solemn moments and the grief of the bereaved ones is compeled to be drawn out and reviewed for an insignificant instance to make all of the annoyance possible in the hope that the plaintiff would give up that which is justly her du eupon a speculative lawsuit.

Mrs. Lauderdale. The deposition of Mrs. Lauderdale, (Rec. p. 542). She was the wife of John W. Lauderdale and lived near Mr. Smith and at the time in question. She knew "Bess's" mother and "Bess," as they called the plaintiff, and was a close friend of the family as was her husband and she testified:

"Q. Do you remember a time when Bess was on the stage—Mrs. Price, it is now?

A. Yes, sir.

Q. Do you remember going with your husband one Sunday evening over to lunch at the Smith residence, after he married the woman who is now Mrs. Wallace?

A. Yes, sir.

Q. And do you remember a conversation taking place there about Bess, with Mr. Smith?

A. Yes, sir.

Q. You may tell us what you can that Mr. Smith said that evening?

. . . . . .

Q. Before there is any answer, I will ask you, Mrs. Lauderdale, if you can tell us any more definitely about when it was with respect, for intsance, to the time when Bess was on the stage?

A. Well, it is hard to remember to tell—it was the first year of Mr. Smith's marriage to the present Mrs. Smith.

Q. The first year?

A. Yes, it was in that first year, I think, in the summer; he was married in May and it was along toward the last of the summer or fall, I should say.

Q. Of the same year?

A. Yes, as I can remember. It is quite a little while ago.

Q. So that if he was married to Mrs. Grahame in May, 1902, it would be your best recollection that the conversation took place in that same fall?

A. That fall, I would say, as near as I can remember.

Q. Some time during the summer or fall?

A. Yes, it was late.

Q. Was Bess present?

A. No.

Q. Who was present?

A. Just we four: Mr. and Mrs. Smith, Mr. Lauderdale and myself.

* * * * * * * * * * * * * *

Q. Mr. Smith was present during all that time, was he not,—and who brought up the conversation?

A. Mr. Smith.

Q. Now, I will ask you to give us that conversation as best you remember it.

* * * * * * * * * * * * * *

A. It was in reference to him feeling so badly about what Bess had done.

Q. Now tell us, as far as you can, what Mr. Smith said and what was said by others.

A. Well, it was in reference to—so much had been said about outsiders, and he said he didn't care for the general opinion of people, but there was some of his intimate friends that he would like to explain the situation to and let them understand; aside from that he didn't care, and he went on to tell how extravagant she had been with money he had given her after her mother died, to take care of the house, how she had misused it and the way it had been spent and the many bills that had been contracted even aside from that, and the things that had been done—lots of things that I can hardly remember; but it was all pertaining to the way things had gone.

Q. How did Mr. Smith appear during that conversation?

* * * * * * * * * * * * * *

A. Well, he felt bad.

Q. He appeared to feel badly?

A. Yes, very crushed and hurt, and he cried." (Rec. pp. 543-545.)

She also testified (Rec. pp. 552-3), that Mr. Smith had said in the conversation that Sunday night that the money he had given her to use for the house had been used in many ways; she said that he treated Bess as a step-father should treat a step-daughter and as a daughter, while she was there and would frequently come to their house and get her and her husband to go down and play cards with him and he was at their house perhaps three or four times a week. She said that he had not in the meantime made

complaint to them about Bess, (Rec. p. 550), but when pressed by counsel she said:

> "A. I don't think it all came at that one time; I think Mr. Smith had lots to contend with before that time in regard to Bess' actions, but that was the time he opened his heart and complained, because we all knew that everything wasn't just right there; everything wasn't harmony up to that time." (Rec. p. 550.)

She finally said at page 551, that there had been slight objections that were not a strong as the one at that time. She thought they were after Bess went on the stage, but she could not say that they were all after that even. It was evident that she was trying to shield Bess in this examination, but Bess's counsel was pressing her a little. She said that the defendant had nothing to say against Bess in the Sunday night conversation. She said that Mr. Smith was very opposed to the plaintiff going upon the stage and told the witness. She said that Bess was apparently the housekeeper for a while, but she never saw her do very much housework and Mr. Smith kept a nurse for the boys, (Rec. p. 555), and she also tells us that during the time Bess was on the stage, the two children were kept by Mr. Smith and Mrs. Smith and staid in their house. She then testified:

> "Q. Mrs. Smith had the oversight of those children at that time?
> A. Yes, sir; and she was very good to them.
> * * * * * * * * * * * * *
> Q. How did Mrs. Smith, so far as you could tell, appear to treat the children?
> A. Very well.
> Q. On all occasions?
> A. Yes, indeed." (Rec. p. 557.)

J. W. Lauderdale deposition, Rec. p. 513. Mr. Lauderdale was a close friend of Mr. Smith and knew all of these parties and was much at Mr. Smith's house. At one time after Mr. Smith married the defendant, he and his wife were invited over by Mr. Smith, (Rec. p. 515), to a Sunday night lunch, the exact year he cannot tell; they were near

neighbors and he tells of the same conversation of which his wife told in which *Mr. Smith broke down and cried* and it is told best in Mr. Lauderdale's own language:

> "Now, you may tell us how that conversation came about and what your recollection of it is.
>
> A. Well, Mr. Smith, after we had been sitting at the table for some little time, Mr. Smith said, 'Mr. Lauderdale, there is something I want to talk to you about that nobody knows anything about; I haven't talked to anybody about it and it is simply setting me nearly crazy; and that is in regard to the actions of Bess and the reports that she is circulating in regard to my treatment of her. I think you know the family well elnough and know me well enough, to know that I have done everything that I possibly could for Bess, and for the children, and it has got to the point where I must draw a halt.' That was, if I recollect rightly, it was after she had separated from Donald. I think I am correct about that, and he went on to relate the circumstance. He said: 'I told her, now Bess, I will pay the house rent and will give you a certain amount of money, which will be liberal, for the maintenance of the house and you pay the bills and take care of the house just the same as though you were in absolute charge of the house, which I want you to be, and you pay the bills and I will give you an allowance each month.' If he stated that amount, I cannot recall the exact amount, but if I remember rightly, it was between $200.00 and $300.00 a month that he gave her a check for and he supposed everything was running along smoothly, until two or three months after that bills began to come to him for unpaid grocery bills, market bills, meat and other bills which she was supposed to have paid from this allowance that he gave to her. He said, 'I paid them and protested to her for an explanation as to why she hadn't paid them. She gave some excuse, I don't recall what excuse she gave to me, but in my opinion it is largely on account of Donald's habits.' He said he knew that Donald was gambling and that she had on two different occasions taken her mother's (that was her own mother's, not the present Mrs. Smith's) coat, a diamond ring and several other articles and pawned them to raise the money to give to Don-

ald; that she had done that twice, and, says he, 'It has got to that point where I have just simply got to stop; I will not submit to it any longer. She has told different parties in regard to what I was doing and what I was not doing, and it certainly is not fair to me that she should circulate those stories, and I have no defense at all. The whole gist of the matter is that I am going to stop; I am not going to do anything more for them. As long as the children are in my house, I will take care of them, but further than that, I must absolutely stop.' He sat there and the tears ran down his face as he was telling it. Now, that is about the conversation. It was simply to relieve his own mind apparently, have somebody else know the condition that existed, rather than keep it shut up within himself. He was not a communicative man, and it is the only time I ever heard him mention a thing pertaining to Bess or his family matters.

* * *

Q. You were well enough acquainted with Mr. Smith to know whether he was a reticent man, or talked about his affairs generally?

A I considered him a very reticent man.

Q. This was the only time you heard him discuss the question?

A. The only time.

Q. Possibly Mr. Jackson's motion might relate to the question of th eway Mr. Smith appeared at the time, and I will ask you how he did appear at the time of that conversation.

* * *

A. He appeared very much wrought up and hurt.

Q. Was that the time you say he cried?

A. Yes, sir.

Q. Do you recall whether there was anything said by him about whether or not it was advisable to give her further money?

* * *

A. Yes, I think there was; he said 'It isn't justice to me nor to her to allow her to have money that she can spend according to her ideas. She is simply extravagant to the limit, and it isn't safe for anybody to supply her with money calculating to meet her requirements, as it cannot be done,'

or words to that effect. That is practically the sentiment of it."

(Record, pp. 516-518.)

Mr. Smith had also told him, page 521, of telling Dr. MacLean that he could not stand him any longer and again, (Rec. p. 526), the witness said that he had known Mr. Smith for many years and had a conversation with him after Bess went West about his contributing to her support. That conversation took place after the plaintiff had married Mr. Price and he tells of that as follows:

> "A. He told me that he had made an arrangement to send Bess and the boys West, they wanted to go West to her father, who was to contribute $50.00 a month and he was to contribute $50.00 a month for the support of Bess and the children. He had made arrangements with her father to each contribute $50.00 a month toward the support of Bess and the children, and he said they sent them West and he said that from some misfortune that her father had, he wasn't able to contribute his portion of the money, $50.00 a month, but that he had supplied the whole amount; he had sent Bess a check for $100.00 a month himself and did so up to the time that Bess had married Price; and he said after she had married, he felt as though his obligation had ceased."

It will thus be seen from the detailed evidence and citations to the record given above, that Mr. Smith was a man of the highest business integrity, of few words, and steady action, not accustomed to pleading with persons to do a particular thing or likely to make promises which he did not keep; that he had this family thrust upon him by the unfortunate situation; that he liked the boys and had arranged to plan for their education and for $5,000 to their mother at the time he married the defendant, but that his subsequent contributions to them and her subsequent treatment of him had so estranged him from her that he did not feel any particular regard for her. She had been married to a new husband; he had contributed to the building of their home; the children had been adopted by the new hus-

band and had taken his name; the plaintiff had a living father, able to go to Europe for travel and from whom she did not want to be separated by adoption to Mr. Smith, before she became so unruly.

He felt, as any other person would feel under the situation, that his property was his own and he had contributed enough and more than he should have paid to care for this family. He had had but $10,000 when he was married and it had cost him a large share of that after his marriage to the defendant to look after the plaintiff; he had concluded there was no use of giving her money because she wasted it, and, feeling no reason for doing so, he made a new will giving everything that he had accumulated after his marriage, and the balance of what he had not spent upon the plaintiff and her family to the defendant, absolutely, except that he gave the $2,000 which was the balance for the completion of the home of plaintiff, over to her by memorandum which he attached to the note which he held against her and her husband, Mr. Price.

He had no special service; he had had grief rather than love and obedience from the plaintiff; he could not be expected to longer impose upon his new wife the care of the grand-children of a former wife who had a father and mother and a grand-father and a step-father who had adopted them, all living and able-bodied. In the light of these things, if there were none others, the story of the plaintiff is entirely discredited. But even if it were true, as she told it, it amounts to nothing as the legal rules given hereafter will show.

Nancy Bates, (Rec., p. 402). It is intimated that the defendant went forth to seek Mr. Smith's money as a newcomer and a new acquaintance, but there happened to be a lady by the name of Miss Bates, who had lived in Fargo, North Dakota, when Mrs. Graham, now the defendant, and Mr. Smith, had lived there in the '80's; she hap-

pened to be a mutual friend, who at the time of the trial resided in Washington but had been living in St. Paul and Mrs. Graham was her guest in St. Paul as an old friend of her family and from there went with her brother as the guest of Mr. Smith, he then being a widower and she a widow, to the luncheon to which the defendant attended in Minneapolis before the engagement, (Rec. pp. 402-3), and she also happened to have been a guest in the Smith home immediately following his death and remained there for some time when Mr. and Mrs. Price, the plaintiff and her husband, came there and she staid there until they left and she testified:

> "Q. Did you hear any discussion at all, or any talk at all between Mrs. Smith and the plaintiff about any property matters, or will, or anything of that sort, during any of the time they were there, yourself?
>
> A. No, I did not.
>
> Q. Did you see any attempts on the part of the plaintiff to get conversations with Mrs. Smith, which were repulsed in any way?
>
> A. No.
>
> Q. How did Mrs. Smith treat the Prices while they were there, as appeared to you as a guest there in the home?
>
> A. As she treated her other guests, very cordially." (Rec. pp. 403-4.)

The plaintiff did not even cross-examine her.

Mrs. F. C. Duncan. Mrs. F. C. Duncan, the mother of the defendant, would have been called to testify but a stipulation is entered to take the place of her deposition which appears at page 608 of the Record to the effect that she resided in Fargo, North Dakota, when Mr. Smith lived there and their families were friends and that she frequently visited the home after he married her daughter; that in a conversation with Mr. Smith which Mrs. Duncan had a short time prior to the marriage to her daughter, he told her that he had had Colonel Douglas, a Fargo lawyer, prepare his will, leaving most of his property to her daughter and that

he was very happy to do so; that he wished to have her well provided for and that he had provided liberally for Mrs. MacLean, whom he spoke of as his daughter, but that he wishe dhis wife to have most of his property or he would not marry her and that the Mr. Douglass mentioned was the man whot witnessed that will. The will in question was introduced as Exhibit 1, (Rec. p. 585), and is the one which gave Mrs. Smith all of the property except the membership in the Chamber of Commerce, which he then left to his nephew, and the $5,000 to the plaintiff and the $5,000 in trust for the benefit of the children and which the defendant testified was made and the copy handed to her just after the marriage and that she had known nothing about it herself prior to that time, (Rec. p. 461).

Counsel intimates in his brief that this was an unusual circumstance, but it must be remembered in this connection that Mr. Smith was a business man of experience and probably knew that if he had any will outstanding at that time, the statutes of many states would revoke it by the new marriage. There is now such a statute in Minnesota, Section 3666 of the Revised Laws of 1905, which reads as follows: "If, after making a will, the testator marries, the will is thereby revoked."

There was the deposition of *Anna Wright,* who was the sister of the mother of the defendant, in which she says, (Rec.. pp. 534-5), that when Mr. Smith tried to get her and her husband to take "Bess" and the children that they did not do so.

"Q. Why * * * * * * * * ?
A. My health would not permit."

Emily Carlson, (Rec. p. 558), testified on deposition that from 1897 until 1907 she staid constantly at the home of Mr. Smith unless she was away two weeks at a time once in a while, except that she went to Sweden in 1895 and came back in the spring of 1896 and was there in the capacity of general housework to begin with, (Rec. p. 559). She had

been there in the lifetime of the plaintiff's mother and did all of the housework for the house. She ordered most of the groceries and there was the nurse who had charge of the boys, (Rec. p. 560), and that the witness ordered the groceries and things of that sort most of the time after the plaintiff's mother died, (Rec. p. 560-1). She would have breakfast about 8 o'clock in the morning and she thought the plaintiff got up for breakfast more often than she staid in bed and the boys would be down to breakfast, of course, Rec. p. 561). The witness staid on until after the marriage to the defendant and the plaintiff staid there for some time after that but did not have anything to do with the housekeeping, but sometimes took care of the boys a little while and went back and forth and the witness could hardly tell what she did do.

> "Q. Was that about the same as it was before Mr. Smith married?
> A. Yes, sir." (Rec. p. 562.)

She said that Bess was supposed to be the head of the house as Mr. Smith told her during the time she was living there alone that she did the housework and the nurse did the work for the boys, but that the witness, (Rec. p. 567), went ahead and did practically as she pleased about running the house; that during all of that time she never heard any discussion about property or anything of that sort between Mr. Smith and the plaintiff, (Rec. p. 567). She was there at the time of Mr. Smith's death and for some time thereafter and during the period that the plaintiff and her husband came on; that they staid at the house with Mrs. Smith and some of the time with Jessie Carey Smith, who with her husband, when he was there, had been frequently at the house, (Rec. p. 568-9), and were very close friends.

> "Q. And how did you happen to go?
> A. Well, they had written for money, and said that Bess was ill; and we were not sure how things were about that; and we thought it best for me to go down and see about it.

Q. That was after the wire was sent?
A. Yes.
Q. Which you saw there?
A. Yes.
Q. And when you got down there did you have a talk with Bess as to what she expected to do after that?
A. As to what she expected to do?
Q. Yes.
A. Yes.
Q. Tell us what that was.
A. Why, she was going home.
Q. Going home?
A. Yes.
Q. Anything said about Donald going with her?
A. About Donald going with her?
Q. I mean about Ned going with her. I get these husbands mixed.

* * * * *

A. She spoke about going back to Mill Valley and taking care of the boys there and earning her living some way, doing something. She said they had their little home there and she would go back to them alone and take care of them some way.
Q. Nothing said at that time about claiming to be any will, any contract for a will with Mr. Smith?
A. No, there was never anything of that sort said to me.
Q. You never heard of such a thing until after this estate was probated?
A. Never heard of such a thing. I never heard of it."
(Record, pages 358-364; 365.)

She also testified that he had many friends, among them officers of trust companies, during these times, and that he was a man who kept his word in dealings, (Rec. pp. 355-6).

Mrs. Wallace's mother (Mrs. Duncan).

Mr. Hallam.

"Q. But you proceeded to marry Mr. Price, and had the boys adopted as Price's children?
A. When you speak about Dad investigating Mr. Price, he speaks about him very well in that letter.
Q. Yes, I understood so.

A. I wondered if you meant anything outside of that letter. I knew what the letter said, yes.

COURT: You say the boys were adopted by Mr. Price?

A. Yes, Dad wished them—

COURT: Did they take the name of Price?

A. Yes, sir; they did. But they don't go by that name now.

Q. Well, the ultimate act was, however it arose, that from the time you married Mr. Price, Mr. Smith quit making you any allowance for yourself?

A. Yes, any regular allowance.

Q. Well, now, all he did after that was an occasional Christmas present or something of that sort, besides what he did in the way of the home, wasn't it?

A. Why, yes, I presume so. Just what do you mean? There was never any regular allowance except for the boys.

Q. Well, that is what I am trying to get at.

A. Yes.

Q. He didn't pretend to contribute money to you individually right along after that, did he?

A. No.

Q. That is what I want. Now, there came a time in October, before he died in August, when he loaned $2,000 to you and Mr. Price to aid in building a home, did there not?

A. I don't know just when it was, Mr. Mercer.

Q. You don't know just the amount?

A. I don't know just when it was. I thing it was that amount.

Q. You think it was that amount?

A. Yes.

Q. Do you remember that he sent that to you in October and that after October he made no allowance for the boys?

A. I don't remember.

Q. Did you ever know of his making any allowance of any kind to the boys after he loaned that money to build the house?

A. I don't—no, I don't remember." (Rec. pp. 288-290.)

It was not claimed by the plaintiff that the defendant was in any way a party to any original conversation or arrangement had with Mr. Smith and under the circum-

stances, could not have been such a party, but the plaintiff evidently thinking that she had fixed one time and place where no refutation of her story would be possible, told us in dramatic terms how she had gone out with Maud Marshall in the evening and left the defendant with Mr. Smith at home and how she came back to the house late in the evening and that the defendant who was then Mrs. Grahame had come into her room and sat down on the edge of her bed and in loving tones and splendid terms had told her that she would not take her place with Mr. Smith and that everything would go on just the same as it had gone on, etc., etc., but in the many years that had elapsed between the times, her memory slipped a cog and she overstepped the points by simply forgetting what actually took place and was capable of proof by an outsider as well as the defendant.

How much of this dramatic story had been rehearsed by the plaintiff by reason of her experience upon the stage, we do not know, but a nice damper was placed upon it when we found one Miss Jane Clark who, at the time, was living in Portland, where this case was tried, who had formerly lived in St. Paul, Minnesota, and was a friend of the family and a guest at the Smith home and went with the plaintiff on the evening of the engagement, and came back to the Smith home, spent the night and was present when the engagement was told to the plaintiff, and herself slept with the defendant in a double bed in the same room where the plaintiff slept on a sofa that very night, and who tells us what took place as follows:

> "Q. You may tell us what took place that evening there, so far as you saw.
>
> A. Well, Mrs. Price and I had been at a party in the evening with some friends.
>
> Q. A little louder.
>
> A. Mrs. Price and I had been at a party with some friends in the evening, both to the dinner party and theater afterwards, and when we came home, why, Mrs. Wallace—

Q. Mrs. Grahame, it was then.

A. Yes; Mrs. Smith—told us—well, I remember her telling us about her engagement. That is about all.

Q. Now, do you remember the room that was occupied by yourself that night?

A. Yes.

Q. How many were in it?

A. Well, I slept with Mrs. Smith, Mrs. Wallace and Mrs. Price.

COURT: You will have to speak a little louder.

A. Three of us slept in the room.

Q. You slept with Mrs. Grahame?

A. Yes.

Q. And Mrs. Price, whom we call Bess, slept on a couch in the room?

A. Yes.

Q. Did you hear Mrs. Grahame tell about the engagement to Mr. Smith that evening.

A. No, I don't remember of her telling of the engagement.

Q. She didn't say anything about the engagement there?

A. Well, I don't remember when she told it, but I remember she told of the engagement that evening.

Q. Told of the engagement that evening?

A. Yes.

Q. Did you occupy a room with them all night?

A. Yes.

Q. Were you and Bess up in the room when Mrs. Grahame came up, do you remember?

A. I think we went in her room. I think she was reading to Mr. Smith that evening, and we went in there. We went in to talk with them.

Q. You went in to talk with them?

A. Yes.

Q. Well, now, when she told about the engagement, was there anything said by her to Bess about property matters or anything of that sort?

A. No.

Q. Or about her not intending to come between Bess and Mr. Smith?

A. No, I heard nothing of that.

Q. Did she take Bess on her knee, or in her arm, or anything of that sort?

A. Not that I know of.

Q. Didn't see anything of that kind?
A. No.
Q. Or hear anything of that kind?
A. No."
(Record, pp. 341-343.)

Her testimony appears at pages 341-350. She tells us that there was none of the hugging and demonstrations of affection, and no story of the property and of the things which plaintiff intended so dramatically to impress, took place at all. She also tells us that she was down at breakfast the next morning and did not hear any discussion at that time about any properties or anything of that sort; and it will be remembered that the plaintiff had tried to make it appear in this report that she had gone down to breakfast ahead of Mrs. Grahame and Mr. Smith had modified his alleged contract by telling her what he expected to do in leaving her and the children two-thirds of the property. The witness remembered that they had been with Maud Marshall and that they were all friends and that she had been first introduced to Bess by either Miss Bates or Mrs. Grahame, (Rec. p. 250).

So aside from the plaintiff's testimony, there is not a particle of evidence in this case of any promise upon behalf of Mr. Smith to leave any property to the plaintiff or her boys by way of a will under any contractual arrangement with either the plaintiff or the defendant and all of the testimony of intimations and suggestions of the relatives who composed the array of plaintiff's witnesses is entirely inconsistent with the provisions which Mr. Smith made and withdrew, except the bare and indefinite story of the plaintiff herself which, upon its face, is unreasonable and entirely inconsistent with the honest treatment which Mr. Smith always gave in his most generous attitude to the children, whom he loved, to the time of his death, except as they got away from him and were kept away from him and adopted by another party who meant nothing to him, it

would be perfectly natural for him to think less and less about them and consequently less and less of them as the defendant states in her testimony, page ..., appeared to be the case.

DEFENDANT.

Marie Dewey Smith, (Rec. p. 404). The defendant's evidence, therefore, was not needed, but we called her to the stand and she told us in a very straightforward manner how she had visited Miss Bates in St. Paul for about three weeks at the time she became engaged to Mr. Smith, (Rec. p. 405), how she was the same party who had been sued under the name of Marie Dewey Smith in the Minnesota case, (Rec. p. 401), how she and Jane Clark were invited to dinner at the Smith's and Bess and Jane Clark went away before dinner and during the evening she became engaged, (Rec. p. 405). Miss Clark and the plaintiff returned later in the evening and they slept in the same room and she told them about the engagement; that there was nothing said about property matters at all; that she knew nothing about any claim of Bess upon Mr. Smith or anything of that sort; that she had a talk with Mr. Smith at the time of the engagement with respect to what property he had and with respect to whether or not he expected Bess to continue with the boys to live with them, but that that conversation took place the next night after the engagement, and was the night after Bess claimed that she had a talk with Mr. Smith about the property rights. In her own language, she gives that conversation:

> "A. We took a short walk around the block, and it was the first time that Mr. Smith had ever broached the subject of any financial nature at all; and he said then, 'Dewey, I am not a rich man.' He said, 'I had at one time quite a property and lost it, and I have accumulated now about $40,000; but,' he said, 'I am getting a good salary, and my future is very bright. And Bessie is an attractive girl, and in all course of events she will marry, and she is fond of her children,

and she will want her children with her, and will be away, and I shall be alone; and I have known you for many years, and I want you to come to my home.' And then he went on to speak about the property, and he said, 'I hope and expect that I have started now, that my property will accumulate very rapidly, and that we will have all we want to go on with.' And that is about all the conversation we had. I don't remember anything else that was said.

Q. He didn't say anything about ever having made any agreement with the plaintiff here to give her his property?

A. Nothing whatever. I never heard of it.

Q. Did you ever hear of any such thing until —that any such thing was claimed even—until the suit was brought against you the first time?

A. I heard nothing of it. I never knew that such a contract could ever be made between people. It was as much of a surprise to me as a bolt out of a clear sky when that was—

Q. What was the next time that Mr. Smith said anything to you about property in any way?

A. The next time?

Q. Did he at any time before the matter of the will came up?

A. The matter of what will?

Q. Of the will at Fargo, after you were married.

A. Oh, no. There was never anything said about the property after that at that time.

Q. Now, did you know that he was making a will at the 14th of May, until after it was made?

A. No, I didn't. I knew nothing about it.

Q. You were married on the 14th of May?

A. Yes.

Q. 1902?

A. Yes.

Q. After the marriage did he call your attention to the fact—I mean sometime after, that he had after the ceremony made a will?

A. Yes.

Q. What did he say about it?

A. We were married about noon and leaving on the three or four o'clock train on the Great Northern. Passing through the hall, it was in the lower hall, he said, 'Dewey, here is a copy of my will, which you had better keep among your pos-

sessions.' I took it, and I don't remember when I even looked at it. He said nothing more about the will. I took it as a matter of course that that was his will.

Q. Did you know where he left the original at that time?

A. No, I don't think he ever told me where he left the original.

Q. Did you know that he had made a subsequent will to that will of May 14, 1902?

A. No, I did not.

Q. Until after he was dead?

A. No, did not.

Q. He never told you that he had changed his will in any way?

A. No, he never did.

Q. Nor that he had made any new will?

A. No, he never did.

Q. When and under what circumstances did you learn of the will that was finally probated? Tell the Court how it came about.

A. I think Mr. Bell telephoned me that it was time to look into business matters, and I better come down to the office and see about the will being probated.

Q. That is Mr. James S. Bell, of the Washburn-Crosby Company?

A. Mr. James S. Bell, of the Washburn-Crosby Company.

Q. He was the gentleman that Mr. Gibson said was a sort of superior officer?

A. Yes.

Q. Did you go down to Mr. Bell's office?

A. Yes, I went down to Mr. Bell's office.

Q. Now, the St. Anthony & Dakota Elevator Company offices are right on the same floor as the Washburn-Crosby, and they adjoin?

A. Yes.

Q. And their executive offices adjoined each other?

A. Yes.

Q. When you went there, tell the Court what happened.

A. I went into Mr. Bell's office, and he sent for some man to get Mr. Smith's private papers from the vault. And he brought in a tin box, about that square.

Q. About two feet?

A. Yes, about two feet square. And he said, 'You knew that Mr. Smith had a will?' And I said, 'Yes.' And he said, whether he said a later will or not. And I said I knew about the will. He picked up the will and handed it to me, and I glanced over it, and I says, 'This is not the copy of the will that I have seen.' 'Well,' he said, 'This is his last will.' And I said, 'No, he has made no will.' He said, 'Yes, Mrs. Smith, he has made a will.' I heard in the office that he had made a new will.' And he handed it to me and I read it. And that was the first time that I had ever known of a new will being made or had heard of a will being made. I had always supposed that the copy of the will at the time of our marriage, that that will made at the time of our marriage was the one and only will that he ever made.

Q. Now, after that conversation you brought that will to our office, that is, the offices of Wilson & Mercer?

A. Yes, Mr. Bell.

Q. For probating?

A. Yes.

Q. And you went to General Wilson to do that work, principally?

A. Yes.

Q. And he carried on the active probation of that estate for you?

A. Yes.

Q. During the probation of that estate, did you in any way receive any intimation from anybody that it was claimed that Mr. Smith had made any other will, or any agreement to make any other will?

A. None whatever.

COURT: Did you have any agreement whatsoever with Mr. Smith prior to your marriage with him in relation to property rights?

A. None whatever.

COURT: There no ante-nuptial agreement, either orally or in writing?

A. None whatever. I didn't think of such things or even a verbal agreement. There was none whatever.

* * *

Q. Did you ever have any agreement, either oral or written, with Mr. Smith, with respect to what should be done with his property?

A. None whatever.

* * *

Q. So that there never was any talk between you and Mr. Smith as to your giving any property which he would leave you to the plaintiff?

A. I never heard of such a thing.

Q. Or for the children?

A. No, I never heard of such a thing. It was never mentioned.

Q. The first you ever heard that there was any claim of that kind was when the suit was brought in Minnesota?

A. Yes. That was the first time I had ever heard of it, of such a thing at all.

Q. And since that time you have been searching to see if you could find anything about it; and outside of these pleadings you have not found anybody that says anything of the kind, except what the plaintiff said here on the stand, have you?

A. No; never have I heard of any possible way or any possible word to give me an idea that such a thing ever happened, because it never did with me, or that there was ever such a contract or understanding or the least intimation that there was such an understanding."

(Record, pp. 406-412.)

With respect to the matter of the visit of Mrs. Price upon the death of Mr. Smith, it was Mrs. Price's story that Mrs. Smith again recognized the alleged agreement and told her to go back to California; that she need not employ any lawyer or pay any attention to the estate in Probate Court; that is what she here claimed in the complaint, (par. XVI, p. 16), but her story amounted to nothing of this nature (Rec. pp. 321, 326); but the defendant tells how she furnished the $100 which she supposed was to buy tickets back to San Francisco and after they had been gone a number of days they returned to the house and wanted more money and she again furnished them $160 and after they had gone for some time she had a letter from Ned, who was Mr. Price, (See telegram Ex. D, p. 598), which is Exhibit 3, p. 602, and which is a letter from

Chicago instead of San Francisco, dated the 28th of September, claiming that Bess was completely broken down and had been in bed since she reached Chicago, and that they had had forty-eight hours since she had taken no nourishment. He said then that he had the tickets home, but needed some more money. He said that if the doctor were not out, he would send the doctor's certificate of Bess' condition, evidently realizing that their veracity would be questioned, and would mail it that night.

> "If you can let me have $100 as soon as possible I will return it when we arrive home * * *. Hoping that you are well and can accommodate me, I am very sincerly yours, Ned."

She wired him back, (Exhibit 4, p. 303), to the effect that she was sorry for his misfortune, but

> "Cannot do anything more for you."

It would seem as if she had reason to feel that way when she had twice given them money for tickets home and instead they had gone to Chicago and were hanging around there wasting money. After this wire of discouragement, so that too much dissipation would not take place, the defendant sent Jessie Carey Smith down to see whether or not the Prices were sick and furnished her money with which to pay for the third time for their transportation, (Rec. p. 414). Jessie Carey Smith went down to Chicago and bought the tickets herself; took the note of both Prices for it, which appears on page 603 of the Record as Exhibit 5, with their receipt which appears on the same page, and later, under date of January 11, 1908, got a letter from Mr. Price telling of his hard luck and that business was so poor, but

> "I will attend to your matter as soon as possible, but for the present I am very sorry, but if is impossible."

We here have the furnishing, for the third time, of money to enable this irresponsible pair to get back to their home and children when they had gone on to Minneapolis without any special reason, after the funeral which bears

out Mr. Smith's attitude given by the Lauderdale's, that there was no use to give them money.

As to the conversation on the porch, the defendant said that she made no attempt whatever to avoid conversation with the plaintiff; that she did have a conversation with her on the porch at the house; that she said nothing at the time about any agreement and that no agreement with Mr. Smith was mentioned in any way, nor did she say that it was time for the Prices to go home or anything of that sort, (Rec. p. 414); but that the plaintiff herself brought up the matter of going home. We then asked:

> "Q. Was the matter mentioned in that conversation about the fact that this note had been left for them?
>
> A. Yes.
>
> Q. In that conversation was there anything said by either of you to the effet that you would probate the estate and send them their interest?
>
> A. No, nothing.
>
> Q. Did you understand at that time that they had any interest?
>
> A. No, I didn't understand they had.
>
> Q. Outside of this $2,000 note?
>
> A. Non whatever.
>
> Q. Was there any claim made by the plaintiff to you at that time that they had any interest?
>
> A. No, there was no claim.
>
> Q. You did tell the plaintiff that you were surprised when you found this new will had been made, didn't you?
>
> A. Yes, I did.
>
> Q. And you were surprised?
>
> A. Yes, I was.
>
> Mr. Hallam: I suggest you do not ask these leading questions.
>
> Mr. Mercer: I understand she testified to that. I understood her to say Mrs. Smith said she was surprised to find this will.
>
> COURT: She said that at the time the will was shown her the first time.
>
> Mr. Mercer: This is the only time they talked about this will, as I understand.
>
> COUR: I understand you are asking about the

conversations which took place between her and the plaintiff on the porch.

Mr. Mercer: I am. I understand her to say that Mrs. Wallace said to her in that conversation on the porch that she was surprised to find this will.

Mr. Hallam: No, Mr. Mercer; she has not so testified.

Mr. Mercer: I think if you will read her cross-examination you will find she did.

A. Mr. Mercer, do you mean to ask me did I say I was surprised at the second will, surprised about the second will that had been made?

Q. Yes, I am asking you if you were in fact surprised to find there had been a second will made?

A. Yes, yes.

COURT: That conversation was with Mr. Bell. wasn't it?

A. Well, that conversation was with Mr. Bell, and as I remember I told Bess that I was surprised at the contents of his last will, Mr. Smith's last will.

Q. In fact, you didn't know, I think you said this morning, that this second will had been made at all.

A. No.

Q. Until after Mr. Smith's death, when you found it in Mr. Bell's possession.

A. I knew nothing of it at all.

Q. After the plaintiff went back, away, from Chicago to California, or wherever she went, did you receive any communications from her?

A. None whatever.

Q. Or from Mr. Price?

A. None whatever." (Rec. pp. 415-417.)

The defendant testified that she knew of the letter, Exhibit 8, found at page 604. from Mr. Price to Jessie Carey Smith, but that this was the only letter that was ever given her or sent to her or of which she ever knew coming to her or Jessie Carey Smith after they went back; and that she never had any communication from the time they left Minneapolis on that trip, and was not told that the plaintiff had returned to Minneapolis, (Rec. pp. 415-19). She also testified:

"Q. Was the first that you knew that she was back in Minneapolis when she started the suit against you?

A. Yes, when I had this summons and complaint.

Q. Summons and complaint in the state court?

A. Summons and complaint brought to my house." (Rec. pp. 419-420.)

She also testified that she was present at, but took no part in, the conversation above mentioned except one remark which she made:

"A. I think I said just about as Mrs. Smith did. That when P. B. said, 'Dewey, I wish you would take these jewels and take care of them,' I said, 'No, P. B., they are not for me to take. Some time when Bessie feels that she can take care of them herself they are for her, and you had better put them in your safe. I don't want to take them.'

Q. And you didn't take them?

A. No." (Rec. p. 420.)

She then tells of a time when she went with Jessie Carey Smith to pay dressmakers' bills soon after she came back from her wedding trip. That P. B. Smith made her an allowance of $50 per month after their marriage; that the maid, Emily, brought her some household bills when she and Peter B. Smith and little Donald were at breakfast together soon after they were married, and she proceeded to pay bills so far as she could that had been contracted prior to her coming there, out of her $50 per month, then she said, (Rec. pp. 422-424):

"Q. Why did you do that, Mrs. Wallace?

A. Well, because we had had one scene at the breakfast table in regard to these bills which had accumulated on our wedding trip, and I naturally wanted no more scenes. And I thought possibly that things would straighten themselves out, but finally I found that they were accumulating a little bit too fast. In fact, Bess would come to me for money; not very much; but my allowance was $50, and I was getting personal things for myself, and I found that I was going to get very much

behind. It was a matter of annoyance and worry to me, more especially worry because I didn't want to go on that way. And finally Arthur Smith was over at the house one night; we were on the porch, and I told him.

Mr. Hallam: I object to this as not responsive to the question.

Mr. Mercer: I asked her to tell how it came about.

A. This is how it came about: Arthur said, 'Dewey, you are doing a very great wrong about this in trying to protect Bess.' He said, 'The only thing for you to do is to get these bills and have it out with P. B.'

Mr. Hallam: If I understood—I don't understand this was in the presence of either Mr. Smith or the complainant.

A. No.

COURT: This is a conversation you had with Arthur?

A. This was a conversation I had with Arthur Smith.

Q. Was the plaintiff or Mr. Smith there at the time?

A. No, the plaintiff was not there at the time.

Q. The plaintiff was not there?

A. No.

Q. Was Mr. Smith there?

A. No.

Mr. Mercer: I simply want to show enough of it to show that Arthur Smith told her to go to P. B. after she had explained to him what the situation was.

COURT: That is the fact is it, that he told you to go to P. B.?

A. Yes.

Q. Now, go on and tell what happened.

A. I think that all blew over; and that is about all.

Q. You mean at that particular time?

A. At that particular time, yes. That was the only time when I was using my allowance.

Q. You quit using your allowance for that purpose?

A. Yes.

Q. You said you had one scene after you returned, at the breakfast table. What did you mean by that?

A. Emily brought some bills in to me, some

grocery and meat bills of some kind, or there was some bills that had not been paid and had been left at the house. Anyway, she brought them in to me and laid them at my plate. Some question arose at to what the bills were, and I passed them over to P. B. And then I think he sent for Bess to come downstairs.

COURT: He did what?

A. He sent for Bess to come downstairs to the dining room where we were. It was the first really stormy scene I ever witnessed in my life between them.

Q. You had nothing further to do with them after you passed over those bills to Mr. Smith?

A. No.

COURT: Did you hear what was said?

A. Yes, I was there.

Q. Tell us.

A. I don't exactly remember what was said.

Q. Do you remember whether there was anything said as to whether or not money had been furnished already to pay the bills?

A. Yes, I know that.

Q. Who said that?

A. P. B. said that. It was his habit to furnish money for the bills, before the 10th.

Q. He paid his household bills promptly, didn't he?

A. Well, yes, always; all his bills. He was very particular about his bills being paid before the 10th of every month, very punctilious about it.

Q. Now, Mrs. Wallace, you were present at the time when you and Jessie Carey went down to see about the dressmaker's bill and pay it?

A. Yes.

Q. You went with Jessie Carey down for that purpose?

A. Yes." (Rec. pp. 422-424.)

Defendant then tells of the fact that plaintiff's friend, Maud Marshall, had been on the stage and that plaintiff had gotten the idea that she would like to go and Bess asked the defendant to go with her about seeing if she could not help her get a position at a theater in Minneapolis, and then Mr. Smith asked defendant to go with the plaintiff to St. Paul to a theater and the following incident took place:

"We sat up near the front of the stage, and Mr. Smith sat next—Mr. Smith and Bessie next to me. And after the curtain went up I looked at P. B. and the tears were running down his cheeks. And I said, 'Bess, how can you do it?' And she shrugged her shoulders and tossed her head, and said, 'Look here, Dewey, I am going anyway.' That was the only conversation we had. We went home when the theatre was over."

(Record, p. 426.)

She then tells that the defendant soon went on the stage and left her children in the defendant's care and she had to attend to hiring different nurses and looking after the children and she had had no particular experience with children. She also tells about how Mr. Smith had had her keep a copy of a letter which she had written to Mr. Wright and which appears as Exhibit 7 of the Minneapolis depositions, but is defendant's Exhibit 8 at page 591, as appears from the bottom of pages 590 and 591. The letter and the envelope that were actually introduced were copies that she had kept from letters in Mr. Smith's handwriting. which came about as she testified at page 428, as follows:

"Now, how did you happen to write that document?

A. It was at a time when Mr. Smith was about at his wits' end to know what to do about Bess and what to do with her. And he wanted and hoped that Mr. and Mrs. Wright—Mrs. Wright was called Aunt Anna—Bess' Aunt Anna would take Bess and the children, and he wrote this letter; and one morning before he left the house he gave it to me and said, 'Dewey, I wish you would make a copy of this letter for me and file it away among some of Bess' bills.' I had a cubby-hole in the desk up in the den in which he had asked me to keep all of her receipted bills that he had paid, or that he had had me pay or had had Mrs. Jessie Carey Smith pay, bills that had come in. And so he said, 'Put that away with the rest of Bess' bills.' This letter was in his own handwriting.

COURT: That is, the original?

A. The original, yes. I copied it. I went into the den some time that day, copied it and slipped

it in the cubby-hole with these other letters and bills.

Q. That letter has been in our possession from the time that first action was brought. I think it was never returned to you, was it?

A. I gave you that letter when this first action was brought.

Q. You copied that letter so as to make this a copy of what Mr. Smith had written?

A. What is it?

Q. I say this is a copy of what Mr. Smith had written?

A. Yes.

Q. I think I have a typewritten copy of that that we can read faster. It was Mr. Smith who signed his own name to that original letter?

A. Yes, his letter was signed."

(Record, pp. 428-429.)

We had shown by Mrs. Wright that a letter had been received. She could not remember very much about it, but she had destroyed Mr. Wright's letters after his death in Ohio. This letter in which Mr. Smith partially opens his heart to her own family and says that the plaintiff's treatment has been such that she could not expect to be taken back into his family.

Now after this letter was written, Mr. Smith, then turned to her own father and the witness testifies:

"Q. Now, it was after this letter was written that Bess and the children went West?

A. Yes.

Q. Did her father come to the house with respect to arranging where she should go about that time?

A. Yes, he did.

Q. You saw him?

A. Yes.

Q. That is Mr. Ailes?

A. Yes, Mr. Ailes.

Q. And had a talk with Mr. Smith?

A. Yes.

Q. Did you hear all that conversation?

A. Yes, practically all of the conversation.

Q. What was the gist of it?

COURT: At what time was that now?

A. It was after this, after Mr. and Mrs. Wright

had written P. B. that they could not take Bess and the children. And he communicated then with Bess' father and asked him to come to the house, to find out if he would help, suggest something.

Q. Now, tell us what conversation you heard there between Mr. Smith and Bess' father at that time.

A. Well, P. B. told Mr. Ailes practically about what he has written to Mrs. Mright, and then said that he wanted, that he hoped Mr. Ailes would help him solve the solution of what to do with Bess and the children. And Mr. Ailes then said, or they agreed together, Mr. Ailes would give $50 toward her support and P. B. would give $50 toward her support. Mr. Ailes then suggested that Bess go to Tacoma. He either had a relative or very clos efriends in a Dr. and Mrs. Miller, and I believe he communicated with them and found that they would be willing to take Bess to board at their home.

Q. Was that the reason why they went up to Tacoma at that time?

A. Yes.

Q. Because her father suggested their going there?

A. Yes.

COURT: Was that the whole of the conversation now?

A. Was that all the conversation?

COURT: Have you stated all the conversation?

A. As far as I can remember. He was not there very long.

Q. Now, after that time you know of their being down in Southern California?

A. Yes.

COURT: In Southern California?

Mr. Mercer: I mean in California. Excuse me. Mill Valley. I got that into my head, that was Southern California.

A. Yes, in Mill Valley.

Q. You knew of their being in Mill Valley?

A. Yes.

Q. You and Mr. Smith at one time stopped off there to see them?

A. Yes, sir.

Q. Where had you been?

A. We had been in Southern California.

Q. And you stopped at the Prices?
A. No.
Q. Or was that before the Prices were married?
A. That was before they were married; before Bess had married. She was then living in Mill Valley. We stopped in San Francisco, and went over to Mill Valley, and P. B. saw the children and Bess there.
Q. And how long did you stay there at the house?
A. At their house?
Q. Yes.
A. I think P. B. was over there one afternoon, and I was ill and not able to go over the first afternoon that we arrived in San Francisco; and he expected to stay the afternoon and evening. But he left in the morning and came back about 4:00 o'clock that afternoon. And he said he would go over the next day if I was well enough. And I think that the next day when we went over P. B. brought Bess and the two children over to our hotel and took a room next to ours, and they were there all the time we were in San Francisco. about a week.
Q. After that were you in California after she had married Mr. Price?
A. Yes, one visit.
Q. You met Mr. Price there?
A. Yes."
(Rec. pp. 431-434.)

Counsel tried to get her to admit that she held up the knowledge of the death of Mr. Smith from the plaintiff and she undertook to tell him that she had not done so, but she tells Mr. Hallam (Rec., p. 447) that she had communicated through the Washburn-Crosby Company through Boston (Rec., pp. 447-50) and as the Court points out at page 459, it appeared that the telegram (page 598) was not sent until the 20th and the Court saw no special importance in it anyway—neither do we. She tells counsel (Rec., p. 454) that as the boys grew older and as Mr. Smith saw them but twice he seemed to grow away from them year by year and spoke of them less than he did when they first went away, and we

tried to admit a number of times upon the Record, p. 454, that Mr. Smith was fond of the boys, and the Court had no question about that as he stated. It is not necessary to go any further into that.

She said that Miss Clark was in the room when she talked with Bess about the engagement. In other words, to be sure that the Court understood the situation, His Honor asked the following questions, as appeared by the Record, pp. 490-1:

> "Q. I wish you would repeat again the conversation you had with Mrs. Price on the porch after she had come back and ascertained that the will had not provided for her.
>
> A. Yes.
>
> Q. I wish you would repeat the conversation there at that time.
>
> A. I think I was on the porch and Bess came out, and she said to me, 'Dewey, are you going to give me anything?' She said, 'Dad has left me nothing. Are you going to give me anything?' And I said, 'Well, why, Bess—why am I called upon to do this, if P. B. didn't think it best to leave you anything?' As I remember, she said nothing more. Then she said, 'Well, Dewey, we are poor, and we have got to go back, and we have no money to go back with,' and she said, 'I will have to have some money to go back.' And I said, 'Very well, Bess, I will see that you have money to go back.' And I remember that she looked up and looked down the street, and she said, 'I wonder when Ned is coming home.' Oh, another thing: I said, 'Bess, you don't consider this note that P. B. left you and Ned, which will pay off the indebtedness on your house.' Of course, the note was evidently he had sent her the money to build the house with. And she said, 'No.' And I said, 'that is not money—you don't consider the note money, really, do you, Bess?' And she said, 'No, I don't.'
>
> Q. That is all the conversation you recollect?
>
> A. That is all the conversation I recollect.
>
> Q. That covers the whole conversation between you and her touching the will, and touching what you were to do, and what she was to do?
>
> A. We had no conversation about the will.

> We had no conversation about a contract, because there was no contract. There was no understanding. She never mentioned the fact to me, as she says in her—as she says, that she asked me, that I told her I would send on as soon as the will was probated, I would send on her portion. There was never such a word mentioned. Not a word. I never dreamed of such a thing." (Rec. pp. 490-1.)

The only rebuttal which plaintiff presents was her own testimony in which she admitted (Rec., pp. 493-5) that when she told the story about the defendants telling her of the engagement she had forgotten that Miss Clark was there until she had seen Miss Clark in court that day; that she had not seen Miss Clark for a great many years and was not a personal friend of hers, but that Miss Clark was a friend of defendant and had been invited to the Smith house because she was a friend of Mrs. Wallace and she could not quite tell then whether Miss Clark was present the night when plaintiff said that Mrs. Wallace was on the same bed with her she thought instead of being on the couch herself, but she did not deny the facts as presented by Miss Clark and the presumption is that when she remembered Miss Clark and heard the facts she must have remembered that as Miss Clark said they took place and must have then remembered that they did not take place as she claimed they did and as defendant said they did.

Argument on Appellant's Claims as to Facts.

1. Appellant says in her brief, page 1, that there were two branches to Mr. Smith's family, first, the defendant, and second, the complainant and her two sons. Not at all. He left only one family branch, as any man leaves who dies leaving a wife without children.

The foregoing details show that he was bound by neither law nor equity to either plaintiff or her children. He had more than discharged the duties of a stepfather,—she had been an unappreciative, silly sort of a girl who was unable to appreciate his liberality or unwilling to live with her own

relatives when he made his last will and when he died.

She had one divorced husband whom counsel describes in his brief as a successful medical practioner, and who contributes to her boys (Rec. p. 237); she had one husband with whom she was living; her own father was alive and is alive yet; her two sons were with her and had been adopted by the husband with whom she was then living; and she had a father-in-law who wos a dry goods merchant and who gave testimony in this case.

Evidently she preferred a life of ease and luxury and her own way as to whether she would enter matrimony or the stage or live with her own relatives, and, like most persons who have been too much indulged, was perfectly willing to take all that she could get out of Mr. Smith, and call for more under the pretense and afterwards claim that his generous and charitable nature had woven him into an obligation.

At the same time, we find that she had estranged him so that he appealed to her family to do something with her. He had opposed her going upon the stage, as we have pointed out, and at page 591 of the Record we find his own language in February, 1903, just when he wanted her to depart from him:

> "* * It now becomes a question what to do with and for her and her children. The way she has treated me, I can hardly be expected to take her back into my home again, * * * Could you and your family find it in your hearts to take her and the children into your family * *? The way she has acted we could hardly think of taking her into our home and hearts again."

Did He Love Her Then as a Daughter?

We find him calling in an old friend, so that he could have someone to whom he could open his heart and let it be known that the accusations which Bess was making against him were not true, and that he did not think he was obligated to support her. He wanted someone to know

the truth so he called in Mr. Lauderdale and his wife to supper and with tears in his eyes, strong man though he was, he laid before them for his own protection, his own conclusion as to his mistreatment by her and his disposition toward. (See Record, pp. 516-17). He told them,

> "'Mr. Lauderdale, there is something I want to talk to you about that nobody knows anything about; I haven't talked to anybody about it and it is simply setting me nearly crazy; and that is in regard to the actions of Bess and the reports that she is circulating in regard to my treatment of her.'"

Were those the actions of a daughter toward a father?

In speaking of what he had done for her, he said:

> "'' * * it has got to the point where I have got to draw a halt.'"

Did he expect, then, to will her his property?

He told of his arrangement with her,—not to make a will, but to pay her $200 or $300 a month and pay the house rent and she should take care of the house and be in charge of it and pay the bills; he paid her the money and supposed that she was taking care of things for some months, when he began to received grocery bills and meat bills. He paid them and protested to her and she claimed excuses. This was after her husband, Donald, had left her. Mr. Smith said Donald was gambling and that she had taken things from the house twice and pawned them in order to get money for Donald. Then Mr. Smith said,

> "'It has got to that point where I have just simply got to stop; I will not submit to it any longer. She has told different parties in regard to what I was doing and what I was not doing, and it certainly is not fair to me that she should circulate those stories, and I have no defense at all. The whole gist of the matter is that I am going to stop; I am not going to do anything more for them. As long as the children are in my home, I will take care of them, but further than that I must absolutely stop.'"
>
> (Record, p. 517.)

Did he feel any obligations to her?

We find from the record and the evidence cited hereinbefore that at that time he had an outstanding will which made an allowance of $5,000 to her and $5,000 in trust for the boys. This was about the time he sent her away and, failing to get her own relatives to take her off his hands, had made her own father come to time with terms to contribute for one-half of her support; but the father loaded it all on to him, until she was married, when he cut off her allowance, and kept up one for the boys until the house was built and he had arranged to give the last $2,000 on that and the boys had been adopted by the new husband, and they were all fixed happily in their own family as Mr. Smith was then fixed in his with the defendant and he changed his will, leaving them nothing except that note, which he left by an outside memorandum.

What principle is there in reason or justice that would take his property from his wife and give it to this woman?

2. Counsel suggests, on page 2 of his brief, that Mr. Smith referred to the plaintiff as his adopted daughter when he made his will in 1902, and in a letter which is quoted on page 2 of the appellant's brief and is claimed to be in that connection. Why should not Mr. Smith be glad that they were settled in their own home. He was a generous man and had helped build their home and he was then quitting regular contributions to the boys and had so arranged his affairs that they would not inherit from his estate by his will, which is found on page 587 of the Record and dated in January, 1906. But there certainly is nothing in the letter given there by counsel, which indicates any such contract as claimed. It is signed "Dad," but we have already pointed out that the evidence shows that she called him "Dad," and her own father "Papa."

Counsel suggests, on page 3 of his brief, that there was an equitable adoption admitted without resistance, in the defendant's oral examination. No reference is given to the

record in that regard on this point and in view of the fact that it is not correct, we call the court's attention to the fact that no error was specified in that decree for the Court's failure to find adoption, and we could not anticipate that such a question would be raised in order to have the record prepared accordingly; but we pointed out to the Court in the course of th etrial, (Rec., p. 167-170), when this question arose, that there was no pleading that would warrant any proof of an adoption and objected to counsel's going into that matter with any such view. We pointed out in that connection that there was a written stipulation in the case to allow counsel a certain time to amend his bill if he wanted to claim adoption. This was not disputed by counsel and no adoption in fact or law was claimed by him and the court ruled at that time that the case would stand or fall upon the contract alleged.

Under these circumstances, of course, counsel is estopped to make any claim of real adoption; besides we showed by Jessie Carey Smith, as pointed out above, and by the plaintiff herself, that Mr. Smith had at one time talked of adopting her and that she and her mother did not allow it, —she wanted to inherit her father's mining properties in Alaska. Another evidence of putting money matters ahead of love, as she had a right to do if she wanted to do it. She wanted to inherit from her own father.

He had loaned to Mr. and Mrs. Price the last $2,000 for their house and had taken their note dated October 15, 1906. He had cut her out of his will in January, 1906, and had quit contributing to her or the children some time along in that period. His letter, which enclosed to her the $100, was December 14, 1916. He asked her to keep most of the $100 toward furnishing the house and the rest for Christmas as coming from "Dada and Aunt Dewey." In other words, they did not treat defendant as if she were the wife of a grandfather, and Mr. Smith could not be "Dada" to both the boys and the plaintiff, in fact.

3. Counsel suggests, a page 3 of his brief, that Mr. Smith had ejected the husband from his home and contracted with her that all he had would be hers when he was gone. Again, he does not point to the record where any such contract can be found and we find that her story is very disconnected and indefinite; but we suppose she meant it to be to the following effect: that when she decided to get a divorce in the spring of 1907, she accepted a proposition which Mr. Smith had made the fall before, which possibly she meant us to believe was left open, if ever made, by which he would give her his all when he was ready to go if she would stay there and take care of him and the children, and two-thirds of it was to be for her boys and one-third for herself. It is not claimed that this proposition was changed from the time in October when she claims it was made; the evidence is undisputed that she and Mr. Smith both gave testimony in her divorce case and the Court in that divorce case found that she was to act as Mr. Smith's housekeeper for one year under an arrangement by which she was to earn the living for the family and give Donald a chance to practice medicine. In 1903 Mr. Smith's conversation of that transaction as given to Mr. Lauderdale was to the same effect,—he was giving her an allowance and she was to take charge of the house, pay the bills during the period after her husband left, when she claims she was acting as a faithful and dutiful daughter. The husband was gambling and she was sending him money which she got by pawning things from the house, and using the money that was given her for household expenses. Besides that and in about a year from the time she claims the arrangement was made, Mr. Smith had married the defendant to become his real housekeeper and had taken her to the house and showed her that he was not being properly cared for in his clothing and things of that sort. He had made the will of May 14, 1902, and within a year from the time she claims this transaction took place, the

defendant, with no knowledge of any pretended claim, had married Mr. Smith and was trying to shield the plaintiff from the enmity which she saw was likely to come when Mr. Smith would learn what the plaintiff had been doing in the way of money matters.

In addition to this, we find that her statement that he would give the property to the children at the time when Donald left, is not true. She did not then know that she had more than one child and did not discover it for some time, as testified to by Jessie Carey Smith, (Rec., p. 353). She was then intending to go to Donald when he could support her and she admits this, (Rec., p. 241). She was corresponding with him and did not make up her mind to get a divorce on account of what Mr. Smith had told her, but she found that her husband was in trouble again and she told Jessie Carey Smith that she had decided she would get a divorce from him. Jessie Carey Smith told her that if she had made that decision, she had better tell Mr. P. B. Smith about it, (Rec., p. 357). This evidence is undisputed.

Her story itself is extremely meager about this whole affair. She claims that she accepted his proposition, and gives nothing sufficiently definite that a court of equity could find anything to decree.

More than this, it is inconceivable that a person of her disposition would not have raised the question of having a right to be supported, or having a right to be treated as a daughter, or having a right to have the children treated as grandchildren, or supported by Mr. Smith, or to have her own support from him, had she had any such agreement. She would have raised the question or made protests upon it during his lifetime,—it is one of the thoughts that death and greed prompted.

She saw that he was trying to get rid of her and get rid of supporting the children, although he had loved the children as anybody would love two small boys that were being brought up with them; yet, she could not avoid seeing

the fact that he did not want to keep those boys indefinitely in his own home as a burden upon his new wife, and no true mother could expect him to do so. Her own relatives were not willing to take them, their own father was alive and she was not willing to let him have them, and her treatment of Mr. Smith was such that he could not keep her in his home longer; so they were sent away to live on his generosity with the supposition that her father was to pay one-half, until she married again when she was cut off; and, until he aided in building their home, when the boys were cut off from the regular contributions and the same year they were both taken from his will.

4. Counsel suggests that these people have been defrauded in ghastly form, upon the theory that Mr. Smith expelled the husband and father and agreed to take care of these children and her, (App. Br., pp. 3 and 4), and it is suggested by counsel that that stipulation is shown to a moral certainty by several unassailed creditable witnesses, (App. Br., p. 4); but no citation to the record is given in connection with that statement where those witnesses could be found, and we have yet to read in the record or to hear upon the trial, the testimony of a single witness outside of the plaintiff, making any pretense of any knowledge of such an agreement.

5. Counsel quotes from defendant's testimony, on page 5 of Appellant's Brief, to the effect that Mr. Smith seemed somehow to drift away from the boys as they grew older, and he saw less of them, and counsel seems to think that her testimony, pages 457-8, is inconsistent, and a retraction, —not at all. As we pointed out, on page 454 of the Record, we had tried to admit a number of times that Mr. Smith liked those boys and the defendant testifies that he was very fond of them and that they were handsome boys. And Mr. Smith's own treatment of the boys indicates either that he thought less of them or that he felt he had absolutely no obligations to them, for he quit his regular contributions

to them as soon as the opportunity presented itself. That did not keep him from liking the boys or wishing them to succeed or if he prospered he might some day aid in their education. But all of this is very far from any agreement, definite or otherwise, to do so. Counsel makes reference to where Mr. Smith had used the term "daughter" without saying "stepdaughter," for the plaintiff. A man of his experience would understand that if he used this term "stepdaughter" on various occasions it would arouse curiosity, and embarrass the family and particularly the stepdaughter. For people who travel from place to place, and engage in the affairs of the world, understand that those things are unnecessary and that they do not mean anything in particular, especially when she had refused to become his step-daughter, as admitted. On page 7 of counsel's brief, he refers to the defendant's testimony, (Rec., p. 483), and where he asks the defendant if she observed that Mr. Smith had called the plaintiff his stepdaughter and claims that it could not have been true that the defendant never gave much thought to that question and did not go into the matter with Mr. Smith of what relation his stepdaughter stood in; and seems to think it very strange that she did not become curious about the matter or that Mr. Smith never expressed to her anything about doing anything with the property matters; and then when she tells that Mr. Smith was a very reticent man (Rec., p. 452), and that he had never discussed such things with her, but that the children were often spoken of in a casual manner, then counsel says:

"* * save as she confesses, she falsifies."
(App. Br. p. 9.)

He gives us no reference to the record as to any false testimony and he presented no such testimony in the case. There is not a witness nor letter nor a circumstance in all of the evidence in this case which indicates that Mr. Smith ever understood that he had any obligation to these people, aside from the bare and uncertain assertions of the

plaintiff. There is no evidence at all in the record by plaintiff or any of her witnesses or by any documents or by any circumstances of any property left to this defendant for the plaintiff or her children, in any particular amount or at all. The plaintiff says that the defendant told her, when she became engaged, in a very dramatic manner, that she would not come between her and Mr. Smith, that after Mr. Smith's death, the defendant told her that they would send her share for herself and the children.

We produced a witness who was present at the time the conversation about the engagement, Miss Clark, whose testimony appears at page 341 and she tells us that no such thing happened; that there was not any such talk except that they were told about the engagement and that the other dramatic features did not take place; appellant takes the stand in rebuttal, page 493, and says that she remembers that that witness was there, but offers no explanation as to any error in the testimony of that witness, except that she disagreed as to which bed, in the same room was occupied.

Besides, we have the evidence of the defendant that no such thing was true. Beyond this, we find that within a few weeks from the time this alleged conversation took place, with the defendant, that Mr. Smith made the will on May 14, 1902, which shows that he had absolutely no such understanding (Rec. p. 585. She tells us that the morning after the engagement Mr. Smith had informed her of the engagement and that he had modified the contract so that she and the children would have two-thirds instead of one-third.

The testimony of defendant is to the effect that she had no conversation with Mr. Smith about his property until the evening following the engagement, which was the evening of the same day when plaintiff claims that the modification was made, and that Mr. Smith absolutely said nothing about defendant having any interest whatever or any

claim upon his estate; but told her that he only had about $40,000 (Rec. p 470), and Bess and children would probably go.

It would not take much figuring to show that if he was compelled to contribute $100 a month for three or four years and $50 a month to the children in order to give them a home, because the father did not live up to his portion of the subscriptiot, and then gave them $2,000 to complete their house, he would be getting close to the limit of $10,000 or one-fourth of the estate which he had when he married defendant; but never did he indicate any understanding that he was required to do this, but only that he did is at generosity. His prediction that she would marry came true.

Was there any wonder that Jesse Carey Smith understood that he was simply caring for plaintiff because she had no home, or that he quit as soon as she had another means of support?

6. On page 10, counsel makes a quotation from a letter *rejected by the court*, which letter is found on page 605 of the Record, as to the views of an outside party; that letter is no part of this record, for the purposes of treating it as evidence. Error is assigned for not allowing it in evidence. It does not purport to have been written by anybody's authority. There is no evidence that the defendant ever heard of it; but that letter indicates that it is the opinion of the writer and another person and apparently Mr. Hartzell also thought that they would have no faith in predicting a successful outcome on a contingent fee of any case brought against the defendant because they thought Mrs. Smith could not be cajoled or threatened into making a settlement of the case. This letter was written on the 26th of June, 1909, and the judgment for the defendant was concluded on the 30th of June, 1909 (Rec. p. 604). The letter points out to her that she had put herself beyond the pail of sympathy of the defendant by attempting to break

the will. This witness tells her that he understood that Mr. Smith intended that some provision should be made for the boys. This letter is not in evidence and we object to its being used in this way; but if it had been placed in evidence, it would have amounted to nothing, or if we had known that Mr. Brown had ever written such a letter, we could have asked him to explain what he meant by it. The fact is that he is an outsider and she was trying to appeal to him, when her case was pending, to force a settlement as would appear from this letter, if it were in evidence; but under oath, Mr. Brown had stated, at page 512, that when he witnessed the will of Mr. Smith that left everything to the defendant, that Mr. Smith stated *that that was his will.*

Counsel calls attention to the evidence of Mr. Hartzell to the effect that Mrs. Smith had said (Rec. pp. 133-36) that she thought the leaving of the whole estate to her was a matter of leaving it to her honor to take care of the boys, and that she proposed to see that they had a good schooling, but that she could not do anything for Bess. This does not say that Mr. Smith had any arrangement with her and Mr. Hartzell, cousin though he was of the plaintiff, by marriage, admits that there was nothing said about any definite arrangement (Rec. p. 141). The defendant does not remember any such conversation and there was nothing said at the time that impressed General Wilson as being of any consequence. It is true that Mrs. Hartzell, who is the actual relative of the plaintiff, says that the defendant told her she intended to carry out Mr. Smith's wishes regarding the boys, but what those wishes were she did not say that the defendant said nor that anybody said and nobody knows, except that Mr. Smith said at one time that if he prospered as he hoped to, that he would provide for their proper education, not that he had provided for them nor that he was bound to provide nor that he had agreed to provide.

Then counsel lays stress upon the testimony of Mrs. Hartzell to the effect that Mr. Smith said he would not have insisted upon her getting a divorce from the doctor, if he had not intended to provide for her and the boys and that he felt toward the boys as if they were his own and that he should always provide for them. Of course, there is nothing definite about this, except that he urged Bess to get a divorce; but she says herself that when he urged her she refused (Rec. p. 196). And we have the undisputed fact that she finally made up her own mind to leave Donald because of his further trouble and the fact that he was in jail and made up her mind independent of the defendant. Jessie Carey Smith tells of the occasion; how she urged her to tell Mr. Smith (Rec. p. 357) and the plaintiff admits it for want of denial (Rec. p. 240).

Then another relative, Mr. Price, Sr., testified that Mr. Smith said he wanted the boys to have a good education, and that if he lived he would see that they had such an education and means to go into business, and if he died, they were well provided for. Assuming this to be true, it might mean many things. It might mean that since they were adopted into Mr. Price's family, and since they had a home which Mr. Smith had aided in building and he had left a note to the mother and father, that the boys would be well provided for. It may have been true at the time that the $5,000 was in his will for them when this conversation took place, if it took place at all, but if Mr. Smith said that at all, he evidently had in mind that if he continued to live, he would aid the boys just as he evidently had in mind when he spoke to Mrs. Hartzell, if he spoke to her as she claims, that

> "'I shall *at the proper time* provide for their suitable education.'"

In other words, the indication of the testimony of Mr. Price and Mrs. Hartzell was to the effect that Mr. Smith had hoped that in the future he would help out the boys in their

education and the testimony of Mr. Hartzell would be to the effect that what Mrs. Smith said was that that matter had been left to her honor and she proposed to see that they had a good schooling; which could only mean, in the best interpretation for the plaintiff, that Mr. Smith felt kindly toward those boys up to the time of his death and if he lived he had expected to aid them in their education if they proved worthy of it. Nothing more could be expected if he had that inclination, for he was too smart a man to want to educate mere chumps; and all Mrs. Smith's statement could mean in the light of the fact, was that she had discovered after the death that the $5,000 which had originally been provided for the boys, had been removed from Mr. Smith's will without her knowledge and that she had no obligations in the matter; but that she thought she knew Mr. Smith's wishes in his lifetime, and that if the boys should prove themselves worthy, she might feel the same way. Certainly, there is nothing definite in this testimony or anything to indicate that the testimony of the defendant to th ecffect that she did not know of the second will and had made no arrangements with Mr. Smith about the property matters, was in the slightest way inconsistent.

7. Counsel suggests that no one has ever yet had the courage to intimate (App. Br. p. 12) that the defendant can be exonerated if Mr. Hatrzell's testimony is true.

> "for, if so, our laws would be in league with malfeasance."

He then assumes, as he does in many other places in the Record, that fragmentary pieces of evidence showing good will upon the part of Mr. Smith or the defendant, toward those boys, placed upon them legal obligations which they were required to carry out.

Now, let us see what Mr. Hartzell's testimony means in this connection, if taken as true and accurate. When we came to cross-examination, we asked him the questions and received the answers following:

"Q. But she didn't say that Mr. Smith had delegated any matter of taking care of the children to her, did she?

A. I think I have repeated everything that was said between us.

Q. All that you recollect of being said in the slightest way?

A. Yes."

Rec. p. 142.)

That is Mr. Hartzell's interpretation of that conversation while the defendant says that she had no recollection whatever of having ever made such a remark, and that she never had any arrangement with Mr. Smith nor he with her to have any obligation whatsoever respecting the plaintiff or her children.

8. We do not quite understand what counsel means by his "Gibralter" witnesses who

> "* * reveal the very heart of truth as it is in God,"

or that we are precluded by our acts and good words in this record; and we call attention to the fact that on page 439 we objected to the cross-examination where a witness was asked to pass upon the creditability of a witness while the defendant says that she did not make the remark as credite dto her by Mr. Hartzell, but she did say to him that

> "P. B. had given me the greatest compliment that a husband can show his wife by leaving his property to me.
>
> * * *
>
> Q. Did you say anything about the care of Bess and the children?
>
> A. No; because I had no care for Bess and the children.
>
> Q. You had no care of them?
>
> A. There was no care put upon me for Bess and the children. * * * P. B. never left me the care of Bess and the children."
>
> Rec. pp. 441-2.)

The defendant said that she remembered no conversation whatever with Mrs. Hartzell, although she had tried

to remember if any conversation took place respecting these matters and she testified (Rec. p. 442):

> "I didn't make any remark that I understood P. B.'s wishes were such that I had any care or responsibility, financial or moral or physical, any responsibility of Bess or the children."

And the witness testified at page 445, that she never authorized Mr. Brown to speak for her at all in the letter marked "Exhibit F."

9. Counsel seems to think it strange, on page 14 of his brief, that the defendant was unable to tell him what explanation there was as to why Mr. Smith had cut out any alowance in his new will (Rec. p. 460), and that it was a surprise to her to hear that there was a will so cutting it out, (Rec. pp. 460, 477). She tells how Mr. Bell had given her the new will at the offices of the company after Mr. Smith's death and how she was surprised to find that there was a will which left everything to her as she had supposed that the $10,000 provision was still in the will, (Rec. pp. 410, 477). Mr. Bell had died before this case was prosecuted, and we cannot get his evidence as to that, but her evidence is undisputed upon it. Mr. Cook had died and we could not get his evidence as to what Mr. Smith said about the new document which left everything to defendant, being Mr. Smith's will, but that will was admitted to probate and of course that concludes the question as to what was to be done in fact. Counsel admits in his brief, pages 14-15, that Mr. Smith may have thought his oglibations had ceased and says that Mr. Smith intended:

> "The truth is, Smith *intended* to provide and he *did* provide. It is *presumed* that he did, and it is *clear* that he did."

This is the sort of claims made in this brief. No citations to the record of any such evidence and there is no evidence that Mr. Smith ever made the slightest provision in any will or to be added to any will, except the provision

in the will of May 14, 1902, which he withdrew as he had a right to do, under the laws of Minnesota, (Revised Laws, Minn. 1905, sec. 3659):

> "*Who may make a will—How executed*—Every person of full age and sound mind, by his last will in writing, signed by him, or by some person in his presence and by his express direction, and attested and subscribed in his presence by two or more competent witnesses, may dispose of his estate, real and personal, or any part thereof, or right or interest therein; and the words 'every person' shall include married women."
>
> Revised Laws, Minn., 1905, Sec. 3659.

In speaking of the complainant's marriage to Dr. MacLean, counsel says on page 18 of his brief:

> "Smith was not a Pharisee. The junior offense was promptly condoned by the senior offender."

We do not know just what is meant by that, but there had been insinuating remarks made throughout the trial, and in order to avoid any controversy upon that question, we challenged counsel to know whether he expected to undertake to claim that Mr. Smith's home was not run on a high plan and offered to introduce evidence of the fact that it was run on such plan; and counsel admitted then that he would not make any question about anything of that sort. It was never understood by anybody at that trial that the facts warranted the casting of any aspersions upon Mr. Smith. There is then no occasion for such remarks as made at page 28 of counsel's brief. Counsel seems to hold that the plaintiff became a subordinate member of Mr. Smith's family after he married the defendant, (Appelalnt's brief, page 30), and that the servant did not think the complainant felt very much at home after that. Counsel's comments, page 32 of his brief, are as follows:

> "The defendant says this disinheritance is a mystery. We say it is plain. We say it is not the mysterious duplicity of him who loved, but the later duplicity of her who coveted. There can

> be no fact more certain. No doubt Smith mentioned the care of his family, in some way, in those four last years when he and the defendant were alone in Minneapolis. No one can doubt it, but the defendant says 'No.' 'Never, never, no.'"

and page 33:

> "No doubt Smith told the defendant more than once in those last four years when they two were alone, that he wished to carry out his agreement with Bess, and no doubt in order to get the last will as it was, the defendant pledged two-thirds as easily as two cents."

This is more of the sort of statements upon which counsel asks the court to make a decree. Not facts, but the supposed theory of a highly ambitious litigant worked into frenzy by the nervous strain of indiscriminate advocacy.

10. At page 32 of counsel's brief he charges the defendant with concealing Mr. Smith's death from the plaintiff until the day of his burial, and charges her and her "confederate" with giving flatly opposite excuses and then says that they had no excuses for that disgraceful neglect.

Now, it will be noted in this connection that Jessie Carey Smith testified at page 363 that she had a talk with the plaintiff after the plaintiff had examined the will, and this was that talk:

> "She said that she was very much disappointed at the way things had been left; and I said to her, 'Well, Bess, I don't suppopse you expect P. B. to leave you anything.' Well, she said, she thought he might have remembered the boys.
>
> COURT: What was that?
>
> A. Might have remembered the boys in his will."
>
> (Rec. p. 363.)

And plaintiff herself did not like to admit, (Rec. pp. 295-7) that she knew the details about the money matters at the time they went back after the funeral and anchored at Chicago, but she did know that her husband and Mr. Smith were in these communications; and she knew that the $114 which Jessie Carey Smith put up for them to go to Califor-

nia from Chicago was Mrs. Smith's money, and that when they got the money that they took the train for Chicago, and that she had talked over matters with counsel in a general way when she was in Minneapolis for the funeral (Rec. pp. 302-9); she admitted that Mr. Smith himself had strict regard for his own word (Rec. p. 306), and the judgment roll in the former suit was conceded to be in evidence at page 308.

We cannot see how this has any bearing upon the merits of this case. Everybody knows that a succeeding wife, or the second, third or fourth in any family does not hunt up the relatives of her predecessors to invite them into mourn with her over the loss of her husband after they have been separated for a number of years and when that particular relative has so treated the husband as to make it necessary for him to beseech her family to relieve him of her. But if this were an important point, it is shown beyond any question in the record, by the testimony of the defendant, that she did not particularly remember the incidents of the matter, but she did know that there was a telegraph strike, and that she left everything in the way of notices to Jessie Carey Smith. And her testimony also to the effect that she had to get the private wire of the Washburn-Crosby Company, through Boston, to get the news of the death of Mr. Smith to Minneapolis, and the testimony of Mr. Gibson that he and the officials cials of the Washburn-Crosby Company office, through the aid of the president of a railroad company, were enabled to find the body of Mr. Smith and get information back and forth to the defendant, by the use of a private dispatch wire of the president of the railroad company. This might very well have happened at that time, and a message might have been sent as counsel suggests four days later, but these parties were not concerned particularly about this fact at the time as to whether the strike went west of Minneapolis or not. The matter was left to Jessie Carey

Smith to notify the other people and she had stood by plaintiff and Mr. Smith in their various squabbles until it was quite natural that she should think that a telegram for them after the funeral with a letter of details would answer. Nobody suspected that this plaintiff would desire to come on to Mr. Smith's funeral after the way she had treated him in his lifetime.

11. Finally counsel says that no final judgment was ever entered on the demurrer in the suit and that an appeal was begun and dismissed. If he would turn to the Record, at page 90, he would find the judgment sustaining the demurrer and if he would turn to the Record, at page 70, he would find that the order which sustained the demurrer gave the plaintiff twenty days to file an amended complaint if she should be so advised, and also turn to the Record, pages 74-82, he would find a proceeding brought to extend that time, after the appeal had been abandoned and that the Court refused to make further extension upon the showing made. If counsel will turn also to page 539 of the Record, he will find that the clerk in charge of the judgment roll was sworn and testified that there was no transcript of record in that case, that is, of any testimony.

12. So that when the case is ended, there is absolutely no outside evidence to carry out the theory of appellant's statement in his brief of any agreement or of any stipulation with the defendant or of any adoption such as claimed or that Mr. Smith ever shunned any duties which he had to the plaintiff; but upon the other hand, it is a plain, clear attempt of a benefactress stranded in his home with the dissipations of a husband, whom her own father, and not stepfather, allowed her to meet and marry, and who had been given shelter by the charity of Mr. Smith, and he was fond of the boys, and who at one time provided for them in his will, but after having spent substantially the amount of the provision that he had in mind concluded that the man to support her was her husband, and the person to

support the boys was the adopted father, Mr. Price; and that his own estate should go where the law would place it, either with, or without, a will, to his own wife.

I.

RES ADJUDICATA.

What Pleadings Necessary.

It is the rule of the Minnesota Supreme Court (as laid down in an action where a demurrer was interposed to an answer to a plea of former adjudication) that:

> "The plaintiff claims in support of his demurrer to the portion of the answer quoted that it is insufficient because it does not set forth in detail the facts that were alleged in the complaint in the first action, so that the Court may decide by comparison whether the facts claimed in the two actions were the same; that the allegation of the answer to the effect that the facts in the two cases were identical is a conclusion, and not an allegation of fact. The claim is without merit, for the answer alleges the ultimate facts to be proven on the trial, viz., that the facts set forth in the complaint in this action are the same facts alleged in the complaint in the former action, in which there was a judgment on the merits dismissing the action. These ultimate facts constituting the former adjudication are properly alleged, in form and substance, in the answer."
>
> Whitcomb v. Hardy, 68 Minn. 265-267 (71 N. W. 263.)

The above was a case where fraud and conspiracy were charged.

Federal Rule. It is the rule of pleading, as declared in Lindsley v. Union Silver Star Minn. Co., 115 Fed. 46-7 (9 C. C. A.) that:

> "A plea of former adjudication is sufficient if it alleges that the former action was between the same parties, and presented the same cause of action, in a court of competent jurisdiction, and that the judgment of the court was upon the merits of the case. 9 Enc. Pl. & Prac. 620, 621; Gould v. Railroad Co., 91 U. S. 526, 529, 23 L. Ed. 416."

This answer complies with this rule.

The Court had jurisdiction in Minnesota to decide whether the Probate Court was the proper one.

When it is alleged, as here, that the court which rendered the judgment was one of general jurisdiction, as was done here, that is sufficient, without setting out specific facts or steps.

Art. 6, §§ 1, 4, 5, Constitution Minn.
Agin v. Heyward, 6 Minn. 110.
State v. Bach, 36 Minn. 234.
Lamar v. Micou, Admr., 114 U. S. 218.
Gapin v. Page, 18 Wall. 350.

The answer sets out that the Minnesota action was brought, and a judgment rendered by the District Court of the State of Minnesota, Fourth Division, as an equity case, and that that court was one of general jurisdiction.

A. *Such court is the constitutional court of general jurisdiction in Minnesota.*

Article 6, Section 1, of the Constitution of Minnesota, reads as follows:

> "The judicial power of the state shall be vested in a supreme court, district courts, courts of probate, justices of the peace, and such other courts, inferior to the supreme court, as the legislature may from time to time establish by two-thirds vote."

Article 6, Section 4, provides:

> "The state shall be divided by the legislature into judicial districts * *. In each judicial district, one or more judges, * * * shall be elected," etc.

Article 6, Section 5, provides:

> "The district courts shall have original jurisdiction in all civil cases, both in law and equity, where the amount in controversy exceeds one hundred dollars," etc.

This provision has always been held to give general jurisdiction to the district court.

Agin v. Heyward, 6 Minn. 110 (53).
State v. Bach, 36 Minn. 234.

B. *Of this law and these decisions, this Court must take judicial notice.*

In Lamar v. Micou, Admr., 114 U. S. 218 (L. ed. 223), the Supreme Court said:

> "The law of any state of the Union, whether depending upon statutes, or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof. Owings v. Hull, 9 Pet., 607; Pennington v. Gibson ,16 How., 65; Drawbridge Co. v. Shepherd, 20 How., 227 (61 U. S., bk. 15, L. ed. 896)."

C. *The general pleading is sufficient in such courts.*

With reference to pleading jurisdiction to render judgment of such court, there certainly can be no doubt upon this record. The plaintiff sought both courts and entered them of her own volition and litigated the Minnesota case to judgment and that judgment is in this record, and has not been attacked by any means whatever, collaterally or otherwise, by either party.

In Galpin v. Page, 18 Wall. 350, the Supreme Court had under consideration a case going up from the Federal Court in California; there was a question of whether a commisioners' sale, had under a state district court proceeding to wind up a partnership, was valid. That title was drawn in question by the question of the validity of that sale and the state decree upon which it was founded.

Through Mr. Justice Field it is said:

> "It is undoubtedly true that a superior court of general jurisdiction, proceeding within the general scope of its powers, is presumed to act rightly. All intendments of law in such cases are in favor of its acts. It is presumed to have jurisdiction to give the judgments it renders until the contrary appears. And this presumption embraces jurisdiction not only of the cause or subject-matter of the action in which the judgment is given, but of the parties also. The former will generally appear from the character of the judgment, and will be determined by the law creating the court or prescribing its general powers."

The court had the right to say that there was no equity to be exercised in the jurisdiction; but, as seen later, the Probate Court had to decide claims.

Plaintiff is Barred from Recanvassing This Matter in This Court.

This question will be divided for discussion into the following propositions:

1. By the decisions of the Federal Supreme Court, and this court, the law is settled that this court, upon this question must give to the Minnesota case the same effect as it would be accorded in Minnesota; therefore, the test of its conclusiveness must be had by the decision in Minnesota.

2. By the decisions of Minnesota, the judgment rendered there would have prevented a recanvass of the same transaction, even though different evidence or additonal arguments could be produced, or additional pleadings needed.

1. *The Federal Courts give the same effect to the Minnesota case that the Minnesota courts would give.*

Cheever v. Wilson et al., 76 U. S. 108 (604);
Hancock Natl. Bank v. Farnum, 176 U. S. 638 (619);
Tilt v. Kelsey, 207 U. S. 42 (L. ed. 95);
Fauntleroy v. Lum, 210 U. S. 230 (1039).

In Cheever v. Wilson, 76 U. S. 108, it is said:

> "The constitution and laws of the United States give the decree the same effect elsewhere which it had in Indiana. Const., Art. 4, Sec. 1; Stat. at L., 122; D'Arcy v. Ketchum, 11 How., 175. 'If a judgment is conclusive in a state where it is rendered, it is equally conclusive everywhere,' in the courts of the United States. 2 Story, Const., Sec. 1313; Christmas v. Russell, 5 Wall., 302 (72 U. S. XVIII., 478)."

Mr. Justice Brewer quotes the Constitution and statute and states the effect in Hancock Natl. Bank v. Farnum, 176 U. S. 640 (619) as follows:

> "The plaintiff says that the decision of the supreme court of Rhode Island denied it a right

given by § 1, article 4, of the constitution of the United States, which reads: 'Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof,' and the following statute passed in pursuance thereof, to-wit, Revised Statutes, § 905:

'The acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory, or country affixed thereto. The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken.'

The plaintiff's contention that these federal provisions required a decision different from that made by the state court was distinctly presented and ruled against. The jurisdiction, therefore, of this court, is clear. It may examine and inquire whether any right secured by these provisions was denied by the state court, though if it finds that no such right was denied, the judgment will have to be affirmed, no matter what may be the opinion of this court as to the correctness of the ruling as a question of general law.

The constitution declares that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and that congress may not only prescribe the mode of authentication, but also the effect thereof. Section 905 prescribes such mode, and adds that the 'records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken.'

> Such is the congressional declaration of the effect to be given to the records and judicial proceedings of one state in the courts of every other state. In other words, the local effect must be recognized everywhere through the United States.
>
> What, then, is the faith and credit given by law or usage in the courts of Kansas to a judgment against a corporation? What is the effect of such a judgment as there established? This is a question not answered by referring to general principles of law, by determining what at common law was the significance and effect of a judgment, but can be answered only by an examination of the decisions of the courts of Kansas."

In Tilt v. Kelsey, 207 U. S. 42 (L. ed. 95), Mr. Justice Moody says:

> "When, therefore, we come to consider what faith and credit must be given to these judicial proceedings of New Jersey, we must first ascertain what effect that state attaches to them. The statute enacted to carry into effect the constitutional provision provided that they should have, in any court, within the United States, such faith and credit 'as they have by law or usage in the courts of the state from which they are taken.' Act May 26, 1790 (1 Stat. at L. 122, chap. 11), now § 905. Rev. Stat. (U. S. Comp. Stat. 1901, p. 677). They can have no greater or less or other effect in other courts than in those of their own state. Cheever v. Wilson, 9 Wall. 108, 19 L. ed. 604; Board of Public Works v. Columbia College, 17 Wall. 521, 21 L. ed. 687; Robertson v. Pickrell, 109 U. S. 608, 27 L. ed. 1049, 3 Sup. Ct. Rep. 407; Hancock Nat. Bank v. Farnum, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506."

The case of Fauntleroy v. Lum, 210 U. S. 230 (L. ed. 1039) grew out of a case on cotton futures.

The action was brought in Mississippi on a Missouri judgment. Mr. Justice Holmes said:

> "This is an action upon a Missouri judgment, brought in a court of Mississippi. The declaration set forth the record of the judgment. The defendant pleaded that the original cause of action arose in Mississippi out of a gambling transaction in cotton futures; that he declined to pay

the loss; that the controversy was submitted to arbitration, the question as to the illegality of the transaction, however, not being included in the submission; that an award was rendered against the defendant; that thereafter, finding the defendant temporarily in Missouri, the plaintiff brought suit there upon the award; that the trial court refused to allow the defendant to show the nature of the transacion, and that, by the laws of Mississippi, the same was illegal and void, but directed a verdict if the jury should find that the submission and award were made, and remained unpaid; and that a verdict was rendered and the judgment in suit entered upon the same. (The plaintiff in error is an assignee of the judgment, but nothing turns upon that.) The plea was demurred to on constitutional grounds, and the demurrer was overruled, subject to exception. Thereupon replications were filed, again setting up the constitution of the United States (art. 4, § 1), and were demurred to. The supreme court of Mississippi held the plea good and the replications bad, and judgment was entered for the defendant. Thereupon the case was brought here."

And again:

"Whether the award would or would not have been conclusive, and whether the ruling of the Missouri court upon that matter was right or wrong, there can be no question that the judgment was conclusive in Missouri on the validity of the cause of action. Pitts v. Fugate, 41 Mo. 405; State ex rel. Hudson v. Trammel, 106 Mo. 510, 17 S. W. 502; Re Copenhaver, 118 Mo. 377, 40 Am. St. Rep. 382, 24 S. W. 161. A judgment is conclusive as to all the media concludendi (United States v. California & O. Land Co., 192 U. S. 355, 48 L. ed. 476, 25 Sup. Ct. Rep. 266); *and it needs no authority to show that it cannot be impeached either in or out of the state by showing that it was based upon a mistake of law.*"

The judgment on demurrer is a bar rule in Minnesota.

In State of Wisconsin v. Torinus, 28 Minn. 175, in a second action growing out of a sale of logs in Wisconsin, and the general rule is laid down in the language of Judge Mitchell, as follows:

> "The doctrine of res adjudicata, or estoppel by judgment, as it is sometimes less accurately termed, is a rule of law founded on the soundest consideration of public policy. It means that if an action be brought, and the merits of the question be discussed between the parties, and a final judgment be obtained by either party, the parties are concluded, and cannot again canvass the same question in another action. It is founded upon two maxims of the law, one of which is that 'a man should not be twice vexed for the same cause,' the other that 'it is for the public good that there be an end of litigation'; and it is undoubtedly true that if there be any one principle of law settled, it is that whenever a cause of action in the language of the law, 'transit in rem adjudicatam,' and the judgment thereupon remains in full force and unreversed, the original cause of action is merged and gone forever. After judgment on the merits a party cannot afterwards litigate the same question in another action, although some argument might have been urged on the first trial that would have led to a different result. Such a judgment is final and conclusive, not only as to matters actually decided, but as to every other matter which the parties might have litigated and had decided as incident to and essentially connected with the subject-matter of the litigation as the facts then existed. The discovery of new evidence, not in the power of the party at the former trial, forms no exception to the rule. The doctrine is so just, and so necessary to the peace and good order of society, that we have no desire to either modify it or unreasonably limit its application."

In Lumatainen v. St. L. River, etc. Co., 119 Minn. 238 (137 N. W. 1099), this rule was applied even though the pleading was so framed that all the facts were not brought out. The answer denied the allegations and pleaded a former judgment as a bar. The Minnesota court reviews its former decisions, including the Torinus case and Mr. Justice Field's opinion in Stark v. Starr, 94 U. S. 477, and some Federal cases, Justice Field stating in said case:

> "In the bill, the complainant sets up substantially the same matter, though with greater fullness

and detail, which was originally averred in the first suit brought by himself and his brother, and omitted in the amended bill in that suit upon the election required by the court; and also claims that the defendant is estopped by his acts from asserting title to the premises.

The first question presented for our determination is, whether the complainant is concluded upon that matter in the present suit by reason of the proceedings and decree in the first suit. While that suit was pending, the complainant acquired the interest of his brother. It is undoubtedly a settled principle that a party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or proofs or both, *all the grounds upon which he expects a judgment in his favor.* He is not at liberty *to split up his* demand and *prosecute it by piecemeal,* or present only a portion of the grounds upon which special relief is sought, and leave the rest to be *presented in a second suit, if the first fail.* There would be no end to litigation if such a practice were permissible."

Stark v. Starr, 94 U. S. 477.

And again at p. 215 of the Liimatainen case:

"The complaint in the second action states but a single cause of action—such is manifest from the mere reading of the complaint, and the plaintiff does not contend otherwise—and yet thereunder would be provable every allegation of the complaint in the former action and the cause of action alleged in the second complaint would thereby be sustained. This alone, we think, demonstrates that the cause of action alleged in the two complaints is identical, etc."

Again supporting this rule, is McKnight v. Mpls. St. Ry. Co., 127 Minnesota, p. 207 (149 N. W. 131), Oct. 23, 1914:

Such then is the rule of the Minnesota court. The cause of action, the adjudication and the substance of the complaint are the same. The same alleged agreements; the same aleged trust; the same alleged violation.

The judgment on demurrer has the same effect as if upon the merits.

This judgment upon this demurrer to the complaint is

equivalent to a trial of the issues and a finding of the facts as claimed.

Carlin v. Brackett, 38 Minn. 307.
Dohs v. Holbert, 103 Minn. 283.
N. P. Ry Co. v. Slaght, 205 U. S. 129.

In the Carlin case it is said:

> "This judgment was upon the merits of the action as presented by the complaint and admitted by the demurrer, and is as effectual as if there had been a verdict upon the same facts, for they are established by way of record in either case."

The Dohs case says:

> "The order sustaining the demurrer in the first action was upon the merits. Day v. Mountain, 89 Minn. 297, 94 N. W. 887; Carlin v. Brackett, 38 Minn. 307, 37 N. W. 342. In the second action the court determined that the matter was res adjudicata. The appellant was privy to the actions of Straight, who prosecuted the actions on his behalf (Dunham v. Byrnes, 36 Minn. 108, 30 N. W. 402) and is therefore bound by the judgments rendered therein to the effect that the assignment of the policy was not a fraud upon the creditors of Holbert and was not a transfer of non-exempt property."

In the N. P. case the U. S. Supreme Court said:

> "It is well established that a judgment on demurrer is as conclusive as one rendered upon proof. Gould v. Evansville & C. R. Co., 91 U. S. 526, 23 L. Ed. 416; Bissell v. Spring Valley Twp., 124 U. S. 225, 31 L. Ed. 411; 8 Sup. Ct. Rep. 495; Freeman, Judm. Sec. 267."

Many other courts might be cited, but unnecessarily, for the rule is as undoubted as it is valuable.

PRACTICE.

Under Section 4128 of the Revised Laws of Minnesota, 1905, we find the grounds of demurrer expressed as follows:

> "Demurrer to Complaint—Grounds—Within the time allowed by law for answering the complaint, the defendant may demur thereto if it shall appear therefrom either:

1. That the court has not jurisdiction of the defendant's person or of the subject of the action.
2. That the plaintiff has not leagl capacity to sue.
3. That there is another action pending between the same parties for the same cause.
4. That there is a defect of parties, plaintiff or defendant.
5. That several causes of action are improperly united.
6. That the facts stated do not constitute a cause of action." (5232.)

This section was in force at the time the former action was brought. The grounds of the demurrer were as follows:

"Comes now the defendant in the above entitled action and demurs to the compaint of the plaintiff herein upon the grounds that it appears therefrom:
1. That this court has no jurisdiction of the subject of the action.
2. That the plaintiff has not legal capacity to sue.
3. That there is a defect of parties plaintiff in that Donald MacLean should be made a party plaintiff therein.
4. That the facts stated in said complaint do not constitute a cause of action."

In line with the common practice on demurrers in Minnesota and elsewhere, it was the duty of the defendant to demur upon all of the grounds that she had irrespective of consistency, and it was the duty of the court to pass upon all the grounds of the demurrer or upon such of them as it considered advisable to pass upon. If it held that the demurrer was good from the standpoint of every ground as the defendant pleaded, of course that left the matter in the best shape for it would conclude, if possible, all the action as it was then brought and would dispose of the merits in case the technical defects were remedies. The defendant argued only the merits as the evidence of Judge Lancaster shows, but the court simply rendered a general decision.

This it had a perfect right to do, as a court is not required to point out the grounds upon which it sustains the demurrer in particular.

In 31 Cyc. 308, the rule with respect to demurrer upon more than one ground is stated in the following language:

> "All the grounds of demurrer should be stated at once, it being bad practice to file successive demurrers to separate parts of a pleading. So where a party wishes to demur on different groends to the same pleading, all the grounds should be specified in one demurrer, instead of filing different demurrers, it not being necessary that the grounds of demurrer be consistent with each other.
>
> In some jurisdictions a demurrer must be accompanied by a certificate of counsel that he believes it good law and that it is not interposed for delay. Where plaintiff's demurrer to a defense was not sufficient, a further demurrer to the same defense, bad in form and insufficient for that reason, may be regarded as mere surplusage."

With respect to the necessity or propriety of specifying the grounds particularly upon which the demurrer is sustained, the rule is laid down in 31 Cyc. 346, as follows:

> "It is unnecessary and improper for the court to make a finding of facts on its decision of a demurrer; nor is the court required to specify in the judgment the grounds of its ruling, where several causes are assigned."

One of the authorities cited to the above decision is that in Dickinson v. Kinney, 5 Minn. 409, the supreme court saying:

> "In the trial of an issu eof law raised upon demurrer to an answer, it is unnecessary for that court to find in its decision the facts that are admitted in the pleading, because such finding cannot influence the case one way or the other. What facts stand admitted must be governed by the pleading itself, and cannot be added to or taken from by any finding the court may make."

This, of course, does not interfere with the usual practice in Minnesota of taking admissions of facts as being facts upon which there need be no decision, for that is the

general rule in Minnesota. Palmer v. Potter, 26 Minn. 433. And when admissions are made upon the record which leave no issue of fact upon a particular thing, then the pleadings are controlled thereby.

In Saltonstall v. Russell, 152 U. S. 628, the supreme court said:

> "The case having been submitted to the circuit court upon a statement of facts agreed by the parties, or case stated, upon which the court was to render such judgment as the law required, all questions of the sufficiency of the pleading were waived, and the want of an answer was immaterial; and no finding of facts by the court was necessary. Willard v. Wood, 135 U. S. 309, 311 (34:210, 213); Bond v. Dustin, 112 U. S. 604, 607 (23:835, 836)."

At any rate, this decision remains unreversed and the practice of the state court is not for this court.

In the case of Michigan Trust Co. v. Ferry, 228 U. S. 346, L. Ed. 867, suits were brought in Utah upon decrees of the probate court of Ottumwa, Mich. The defendants demurred to the complaint, and the circuit court sustained the demurrers and the circuit court of appeals affirmed that decision.

The question in that case was whether the decree was too broad for the jurisdiction of the probate court, and the supreme court said:

> "Upon this question courts of other jurisdictions owe great deference to what the court concerned has done. It is a strong thing for another tribunal to say that the local court did not know its own business under its own laws. Even if no statute or decision of the supreme court of the state is produced, the probability is that the local procedure follows the traditions of the place. Therefore we should feel bound to assume that the Michigan decree was not too broad, in the absence of statute or decision showing that is was wrong.
>
> But unless and until the supreme court of Michigan shall decide otherwise, we are of opinion that the probate court was right."

In Sullivan v. Minneapolis & Rainy River Ry. Co., 121 Minn. 488, the court said:

> "The grounds for the demurrer are: (1) That the court was without jurisdiction; and (2) that the complaint does not state a cause of action. It does not appear on what theory the court based its ruling."

The court overruled the question of demurrer as to jurisdiction upon the theory that the defendant was not engaged, according to the showing, in interstate commerce and that the demurrer could not be sustained upon that ground. It then reversed the lower court which had sustained the demurrer upon both grounds upon the proposition that the complaint did state a cause of action on the merits.

Again, in the case of Laird v. Vila, 93 Minn. 45, in an action where it was claimed that a party had obligated himself to make his will conveying real and personal property, there was a demurrer introduced to the complaint, and the court said:

> "Three objections are presented by the demurrer to each cause of action: (1) That the trial court is without jurisdiction of this action; (2) that another action is pending between the parties for the same cause; (3) that the complaint does not state a cause of action.
>
> In holding that the first and second objections are not well taken, we need only refer to the repeated adjudications of this court in which the questions presented were decided and set at rest. In Mousseau v. Mousseau, 40 Minn. 236, 41 N. W. 977, it was held that, while the probate court had jurisdiction to direct an executor to enter into a conveyance of real estate which his testator had bound himself in writing to make during his lifetime, still the court was without jurisdiction to decide against a party applying for such a conveyance. In other words, the court held it was without full jurisdiction in the premises. On the other hand, it was expressly held in Evanburg v. Fosseen, 75 Minn. 350, 78 N. W. 4, and reaffirmed in Stallmacher v. Bruder, 89 Minn. 507, 95 N. W.

> 324, that the probate court is without, and the district court has, jurisdiction over actions for the specific performance of parol contracts for the conveyance of real and personal property."

By this we see that it was not only the usual practice, but it was the necessary practice to bring in the question of the jurisdiction in this particular kind of a case, for it is perfecly apparent from the original case, as it seems to us, as it is from this case as we shall later argue, that specific performance could not have been granted upon the alleged situation as here presented. The appeal that was taken was abandoned. Not only that, but the Laird case pointed out that so far as apply to real estate where the wife had received the real estate under the will, pursuant to the agreement, she and her heirs were stopped to deny the matter.

Of course, under section 3483 of the Minnesota statutes, a contract for services could not be made orally which was not to be performed within one year. O'Donnell v. Daily News Company of Minneapolis, 119 Minn. 378.

In the inception and without partial performance, the alleged original contract would be within the statute of frauds of Minnesota.

In O'Donnell v. Daily News Company, 119 Minn. 378, at p. 385, the court said:

> "For it is settled that a contract for services which by its terms shows that it is not to be performed or is incapable of performance within one year from the making thereof, is within the statute (Spinney v. Hill, 81 Minn. 316, 84 N. W. 116; White v. Fitts, 102 Mo. 240; Chase v. Hinkley, 126 Wis. 75; Lee's Adm'r. v. Hill, 87 Va. 497; Gulport v. Renaeu, 94 Miss. 904."

In Robertson v. Corcoran, 125 Minn. 118, the court said:

> But to authorize a court to decree the specific performance of an oral contract to give property

> by will, the contract must appear reasonable, and be clearly and satisfactorily established; and it must also have been performed, on behalf of the beneficiary, to such extent and in such manner that he cannot be compensated properly in damages. If the part performance relied upon consisted in the rendition of services, the value of which can reasonably be measured in money, specific performance will not be enforced and the promisee must have recourse to other remedies. Stellmacher v. Bruder, 89 Minn. 507, 95 N. W. 324, 99 Am. St. 609; Richardson v. Richardson, 114 Minn. 12, 130 N. W. 4; Haubrich v. Haubrich, 118 Minn. 394, 136 N. W. 1025.

That case also said:

> "The contention that these cases were not within the jurisdiction of the district court is without force. Laird v. Vila, 93 Minn. 45, 100 N. W. 656. 106, Am. St. 420."

That case was decided in 1914, so that it is undoubtedly the rule in Minnesota now so far as its appellate decisions have passed upon the matter that a contract to make a will, even though oral, if one which can be specifically performed may be held to be valid in a court of equity, but that there must be such part performance as will prevent compensation for the services rendered, or, as pointed out of the statute of frauds.

But, we do not state that this is the law in Minnesota, for we do not think it is so far as it gives sanction to the rule that a contract of this sort may be made to make a will, and if the matter is material, our reason for opposing the rule would be that the Minnesota decisions may be examined from first to last, (unless there be something which we have overlooked), and yet we would claim that by reason of the fact that the public policy of Minnesota as declared in its statutes with respect to making wills and with respect to the statute of frauds, and with respect to the inheritance

which the wife shall receive and with respect to the revocation of a will by subsequent marriage, it is shown that it has been the legislative intent of the state from the beginning that such a contract would be invalid. We cannot find that this matter of public policy, except as to the statute of frauds, has been discussed in the Minnesota decisions, and the decisions have escaped the statute of frauds upon the theory of part performance.

But, in this case, these things become immaterial for two reasons:

1. There is not the slightest pretension in this case so far as the alleged contract with the defendant is concerned at the time of the alleged modification from the whole to two thirds, that there was any such delivery of property or any such change in any will or any such subsequent services as to make any pretended part performance or consideration.

2. It is not even claimed that the plaintiff did anything in the way of personal services or love or affection or household management or anything else for which she could be compensated.

Of course, a husband could not contract to make a will so as to will away his property from his wife, at least as to the two-thirds, because of sections of the Revised Statutes of 1905, given hereafter.

The same practice exists with respect to want of legal capacity to sue as is evidenced from the case of State of Wisconsin v. Torinus, 22 Minn. 272, wherein the Court said, at p. 273:

> "The demurrer was on the ground that the complaint does not state facts sufficient to constitute a cause of action, and that it appears from it that plainiff has no legal capacity to sue. * * * * To make the pleading open to demurrer on that ground, the want of legal capacity must appear from it affirmatively. If it do not, such want of capacity can be taken advantage of only by answer."

See Lehigh Valley Coal Co. v. Gilmore, 93 Minn. 132-134.

The same practice has prevailed in Minnesota as to definition of parties. In that case demurrer for defect of parties pointed out, as the court held it should do, the persons who were to be made parties, but that was the third ground of demurrer as the opinion shows in that case.

FEDERAL PRACTICE RECOGNIZES IT.

It would seem, however, to be unnecessary to spend much time upon this, for it has long been the established rule that a court may decide a case upon many grounds even though one of those grounds be that it lacks jurisdiction, and that if an error is claimed it may be claimed upon all the points of the decision, but if the court is willing to rest its decisions upon want of jurisidiction alone, it may decide upon that ground alone and that disposes of the matter.

Indeed, the practice is so common in the Federal courts that a distinction is made in the practice in appellate procedure, dependent upon whether the court bases its decision alone on jurisidiction or upon jurisdiction and other grounds. Under the federal procedure, since the court of appeals act went into effect, it is so that if the district court dismisses a case upon jurisdictional grounds and also upon other grounds, the appellate court is the court of appeals, while if it dismisses it upon want of jurisdiction alone, the only court to which resort can be made is the supreme court of the United States:

See McLirsh v. Roff, 141 U. S. 6661.
Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, L. Ed. 496.

As stated by the present Mr. Justice Van DeVanter in Harris v. Rosenberger, 145 Fed. 449, this matter is now foreclosed by the decision in the former case as pointed out by this, the Ninth Circuit Court of Appeals, in Union Pacific Ry. Co. v. Oregon & Wash. L. Mfrs., 165 Fed. 1-18:

"In this court the appellees moved to dismiss

> the appeal on the ground that only questions of jurisdiction are involved, and therefore that the appeal should have been taken to the supreme court. The answer to the motion is that the appeal to this court was taken not only on the ground of the lack of jurisdiction of the court below over the cause of action alleged, but also upon the ground that the order appealed from commands the defendants to violate the act of congress to regulate commerce, and on the further ground that it was made in the absence of indispensable parties. Only the question of jurisdiction can be taken from the trial court directly to the supreme court, and then only questions 'involving the jurisdiction of the circuit court as a federal court.' Louisville Trust Co. v. Knott, 191 U. S. 225, 233, 24 Sup. Ct. 119, 122, 48 L. Ed. 159; U. S. v. Jahn, 155 U. S. 105, 115."

Indeed, this is the rule as incorporated into Section 238, the Judicial Code.

So that the fact that the decision of Judge Brown in this case may have covered matters outside of the merits does not prevent the effect of the decision upon the merits. The court had a perfect right to say that this case is defective both in substance and form and the present case stands in precisely that situation.

Nor do we know whether the decision ought to have covered or was actually intended to cover, jurisdiction on any matters except the merits; they were put in and the merits alone argued, (Rec., p. 575.)

Indeed the case of H v. Brown, 201 Fed. 246, decided by *this Court* was reversed by the Supreme Court of the United States in 235 U. S. 342, with an expression of surprise that the court of appeals should have regarded the matter in any other light than that the highest court of the Hawaiian Islands did not correctly exercise its own powers and duties. The Supreme Court saying:

> "It is unnecessary to consider whether this second case again made the matter res judicata. It is enough to refer to it here as authority with regard to matters of local procedure, as to which innu-

> merable cases have established the weight to be given to the local courts. Tevis v. Ryan, 233 U. S. 273, 291, 58 L.Ed. 927, 967, 34 Sup. Ct. Rep. 481; Nadal v. May, 233 U. S. 447, 451, 58 L.Ed. 1040, 1041, 34 Sup. Ct. Rep. 611.
>
> It appears to us surprising to suggest that the highest court of the Hawaiian Islands did not decide in accordance with the requirements of the law o fwhich that court was the final mouthpiece; and that courts of another jurisdiction, sitting long afterwards, know its duties and powers so much better as to be entitled to pronounce its proceedings void. The caution required in such a venture, even as against less authoritative decisions, has been stated and restated, from United States v. Percheman, 7 Pet. 51, 95, 8 L.Ed. 604, 620, to Michigan Trust Co. v. Ferry, 228 U. S. 346, 354, 57 L.Ed. 867, 874, 33 Sup. Ct. Rep. 550. And when it is added that the grounds for the supposed invalidity are matters mainly of form and local procedure, and wholly of local control, it seems to us plain that the judgment must be reversed."

But, it has long been the practice in Minnesota, as evidenced by other decisions, some of them of this sort of cases, that demurrers are interposed upon the various grounds of the statute in the same demurrer and decided together by the lower court and decided together by the Supreme Court.

On pages 81-83 counsel presents an argument against the binding effect of the decision on demurrer. He gives us Russell v. Place, 94 U. S. 608, which holds that a judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties. But it must appear upon the face of the record or be shown by extrinsic evidence that the precise question was raised and determined in the former suit. If counsel would examine the Record, pages 575-6, he would find that we showed by W. A. Lancaster that the merits of the case was the one thing that was argued for one and one-half days and the decision it-

self says that the demurrer was sustained upon all of the grounds. This is not disputed.

Counsel cites Hoover v. King, 43 Oregon 281, to the effect that when a case presents more than one issue upon which the judgment may rest while one goes to the merits, and others do not, it will be inferred that the judgment was not based on the merits unless it so appears.

Again we call attention to the fact that it does so appear in the case and that the judgment itself, (Rec., p. 90), recites that the demurrer is in all things sustained.

Counsel cites Kleinschmidt v. Binzel, 14 Mont. 31, to the effect that where a demurrer has been interposed to the complaint on several grounds both as to form and merits and it is sustained generally, it does not bind the parties on the merits where it does not appear in the record or by extrinsic evidence that that was a ground of decision, but we call attention to the fact that it does again appear in this case, the only question argued was the merits.

He cites Bissell v. Spring Valley Township, 124 U. S. 225, which holds that the entry of final judgment on demurrer concludes the merits in a subsequent action on a different claim so far as the relation relates to matters litigated on the demurrer in a prior action.

The case cited from 29 Gratt. 494, is to the same effect and this is the class of cases cited by counsel on this proposition. His reason for so thinking is that the grounds of demurrer covered both the merits and other subjects in this case and he points to Gerrish v. Pratt, 6 Minn. 53, to the effect that a judgment on the pleadings for costs on the ground that the complaint does not contain facts sufficient for a cause of action, is not a bar to a second action for the cause of action attempted to be alleged in the first complaint. But that case was one where the action was brought under a replevin bond. The defendants pleaded a former judgment in favor of the defendants in the district court in

Minnesota. The Minnesota court recognized the rule in that decision, that a judgment was a bar as to the matters in issue, but that the lower court had found that that judgment was rendered only for costs and not on the merits involved in the action, but because the complaint did not state a cause of action. The court in that case held that if it had been an adjudication on the bond itself, it would have been a bar but that the lower court had found that the original decision was not made upon the merits.

There has been a practice grown up in Minnesota which permits the court to dismiss a case for failure of proof, or upon an objection to the introduction of evidence, or a motion to dismiss by the opposite party, and then a judgment for costs alone may be entered by virtue of the statute. Revised Laws, 1913, Sections 7982, 7974. But there is also a practice which enables the court to sustain a demurrer on the merits or to render judgment upon a motion for judgment upon the pleadings and to render that judgment upon the merits as well as for costs. See Revised Statutes of Minnesota, 1913, Section 7782. The later practice is what the court followed in this case. It sustained the demurrer on the merits, and ordered judgment on the merits. (Rec. p. 90).

II.

THE DECISION OF THE MINNESOTA COURT WAS RIGHT; BUT RIGHT OR WRONG, IT WAS BINDING IN MINNESOTA, AND THEREFORE BINDING IN OREGON.

The decision that was made in Minnesota covered all the grounds of the demurrer and, as previously pointed out, the practice in Minnesota is the practice which controls this court.

COUNSEL'S PRECEDENTS.

We must keep in mind in the application of precedents, two things:

1. What they really hold which can only be told when

we keep in mind the question that was up for decision.

2. Whether they are binding precedents or only suggesting precedents.

Keeping these things in mind, we examine counsel's precedents to our heart's content and find no precedent where any court, by any decision, which is either binding or suggestive has ever rendered a decision in favor of a complainant on as weak a case as plaintiff has here. Let us examine them and see.

Starting in at page 21 of Appellant's Brief, with the case of Brown vs. Sutton, 129 . S. 238, we have a Wisconsin case, wherein an intestate bought land for a woman and promised her that he would make the title of it to her upon the consideration that she would care for him during the remainder of his life as she had done during the past. He was a man in declining years and actually entered into an agreement to receive her services the remainder of his life. He was an old and sickly man; he needed a great deal of nursing and wanted more care and attention than people usually wanted. He dreaded to be alone. She went nearly everywhere with him and devoted most of her life to him as a daughter would do to her father. It is so unlike this case as to need no discussion.

Turning to the authorities cited in Appellant's Brief, page 43, we find the case of Kelly v. Devine, 65 Ore. 217-218. That case is wholly unlike the one at bar. There a contract was shown to have been made about ten years prior to the death of the father, but the attack was on the theory that the plaintiff only spent part of his time at the farm and in the management in the business of the father and was paid for his labor in full. The court held that the preponderance of the testimony was sufficient to sustain the finding. There the father made the contract with the son at a time when he was anxious to keep the son with him and the court points out that those were services such as could not be measured by a pecuniary standard.

Coe v. Coe was a divorce case for the dissolution of the marriage contract and a suit for an accounting.

Counsel cites from Robertson v. Corcoran, 125 Minn. 118, wherein the Minnesota court held that such a contract would have to be reasonable and satisfactorily established and performed to such an extent that the beneficiary could not be properly compensated in damages. This case does not take up the point which seems to have been entirely overlooked, by the Supreme Court in Minnesota, that the legislative acts of that state fix a public policy different from this view. But the facts in that case were that the plaintiffs were brother and sister and the children of Jane Carr. Their mother had died when they were six and ten years respectively, and a childless farmer made an arrangement with their father to allow them to be adopted and to provide them a home and treat them in all respects as his own children and agreed that if they should remain with him as members of his family until they grew up, he would bequeath them one-half of his property. He frequently stated the agreement to them and promised to perform upon his part. The court held in that case that the complaint stated a cause of action but that the court could not tell what the result would be upon the merits in advance.

O'Hara v. Dudley, 95 N. Y. 403, is a case where the testatrix willed the bulk of her estate to her lawyer, her doctor and her priest in Kurd and has no application here.

Curdy v. Burton, 79 Cal. 420, was a California case of this same nature and relied upon the New York case. It has no application here.

Woodville v. Morrill, 130 Minn. 92, was a case involving the validity of the will of a deceased brother who had been in an insane asylum, and we see no special reference that it has, to this case. And the court pointed out that the testator had remembered his relatives in an unsubstantial way by reason of certain prejudices that he had against

them, but his failure to provide for them did not invalidate his will. The court points out:

> "The fact that he practically ignored them in the prior wills and at a time when there was no claim of insanity, fully warrants the inference that it was deliberate and intentional."

That was a case where the legacies to friends were held justifiable. In that case there was a gift to the wife of the attorney who drew the will, which attorney made great efforts to take the testator out of the asylum.

Thomas v. Maloney, 142 Mo. Appeals 193-198, was a case where parties had reared a child until she was twelve years old as their child. She did not know the difference until that time. They then agreed to adopt her and keep her as their own daughter. They told her and she had really believed that they had adopted her; they had gotten a promise fro mher father not to treat her as his child and she stayed with them rendering to them filial love and duty such as she would owe to parents, until she was twenty-one years of age. None of these elements appear in this case on this record. We have already pointed out that this case was limited to a contract and not to adoption and was not tried upon the theory of adoption and therefore the rules with respect to adoption would not prevail.

Fiske v. Lawton, 124 Minn. 85, was a case where a child was taken in Ohio by a contract to adopt which was in writing and afterwards lost. Such a contract being valid in Ohio the Minnesota court supported it. But as we have previously pointed out, counsel decided not to rest upon that ground and to rest upon the alleged contract.

Daniels v. Wagner, 237 U. S. 547, is a case which went up from this circuit. Counsel says the facts are different but the equities the same. That was a case where the State of Oregon prepared lists, selected lands, and placed designated school lands, and filed those lists in the local office and transmitted them to the State Local Land Office for ap-

proval. Before the approval, the state sold lands to Daniels. The department then refused to approve the state lists because of certain errors and this left Daniels without the right to the land, etc., etc.

We need not go further to show that the case has no application here.

On page 52 of Counsel's Brief, he suggests that they offer a letter of Mr. Barnes, but gives no place where that letter can be found in the record and we have not been able to find it in the record and do not remember it, unless it could be pointed out, of course, it could not be used.

Counsel suggests that the case of Laird v. Vila, 93 Minn. 45, had been decided in 1904 to the effect that a party might obligate himself to devise and bequeath real estate and personal property to minors in consideration for their assumption of the peculiar domestic relation and the performance of services impossible to estimate by pecuniary standards and holding that the district court was a court that had jurisdiction of such a case. We shall point out briefly under our discussion, why this made no difference, but the fact remains that the district court made the decision upon rightful grounds as we claim, and the plaintiff must have been so advised else she would have prosecuted her appeal; whether right or wrong, makes no difference in the validity of that judgment as the authorities given will show.

We might continue to go through these cases one by one and point out their inapplicability to the facts in this record and when we are through, we would find not a single case sustaining those of appellant. We find that counsel has picked up cases of old and decrepit men and women taking active and loyal children or nurses and getting from them that sort of care which cannot be computed in such way as to give them fair compensation and such care and relations as the party would not have assumed under an ordinary contract of hire. But none of these cases are applicable to the case at bar. They are congregated here in the brief

under various headings with no applicability to the Assignment of Errors and no such segregation of principals as enable us to discuss them as applicable to any particular thing and we do not believe that it is our duty to wade through them and weary the court by discussing case by case under these circumstances.

At the time this demurrer was interposed and this case argued upon the merits there were a number of things which had not been passed upon by the Supreme Court of Minnesota and which have never been argued to the Supreme Court of Minnesota to this day in the way we think they should have been, and which would have justified that court in upsetting its authorities if necessary, upon this case and there were other lines of authorities that would have compelled that court, if it followed its own decisions to the letter, to hold that there was no such inequitable treatment of this plaintiff by Mr. Smith in their financial matters as to prevent her from obtaining compensation if she was entitled to anything for her services, or that she had not been more than paid for all of the relation which she ever occupied to him.

In the first place, it was stipulated and adjudicated that this was an oral transaction. As such, it could only be held for her on the theory of specific performance or a remedy kindred to that. Specific performance is always addressed to the conscience of a court of equity and there was nothing about this case to show any hardship administered to the plaintiff—only that she wanted Mr. Smith's property and did not get it—she was not entitled to it.

Counsel suggests that a trust should be carried out but he fails to show that there was any trust. He says that the record admits of no doubt that the defendant is concealing something, but he points to no place in the record which shows this and there was no such place. He assumes that a fiduciary relation existed in favor of his client, but does not show it. He says that what he claims was Mr. Smith's ex-

pressed agreement in 1900 and 1901 to leave the complainant all of his property, and at the time of the alleged modification engagement, is confirmed by his admission of his practical achievement by the divorce obtained through his dictation and by the admission of himself and his wife to third parties. The trouble is that counsel points to no place in the record where any such things are shown and they were not in the record.

In other words, we showed by Jessie Carey Smith, that the plaintiff made up her mind to get her divorce because her husband was in trouble again and in jail and she asked the plaintiff herself to tell Mr. Smith that she decided to get a divorce. While the plaintiff does not deny this in her rebuttal, she simply avoids it. The defendant says that she never had such an understanding and never heard of it. Mr. Smith's whole conduct shows that he never so understood it. He told the witnesses when he signed his last will that that was his will. He told Mr. Lauderdale that he had simply had an agreement with her to live there and he would pay a certain amount per month and she should pay the household bills and act as his housekeeper. She did not deny that in rebuttal. She side-stepped direct admission of it or a direct denial of it in her cross-examination of her case. We may assume that it was true from her own actions in the matter. We showed by the defendant and by Miss Clarke as previously pointed out that the dramatic story which she concocted to impress the court with a view that the defendant had lovingly promised her on the night of her engagement, that she would not come between her and Mr. Smith, and that Mr. Smith modified the agreement on the following morning so that his intended wife could have one-third of the estate. We showed by these witnesses that were present on the night that the engagement was brought up, that plaintiff's story was not true. Plaintiff's rebuttal shows that she does not want to deny that fact (Rec., p. 493). We showed by the same wit-

ness, that she saw nothing of such interview as the plaintiff claimed that she had with Mr. Smith just before breakfast. We showed by the plaintiff that Mr. Smith never talked to her about property until the night of this alleged modified agreement as claimed and also the night following the alleged tale of the engagement. In fact the whole case bristles with things inconsistent with plaintiff's story. Her whole life afterwards is out of accord with the claim which she makes. Mr. Smith's whole life was out of accord with it and none of her relatives were able to bolster it up.

The segregated suggestions such as counsel makes in his brief, pages 76-83, show upon the face both that they were inapplicable and that counsel has simply selected groups of cases from some Digest or some place of that sort and thrown them in in bunches in an attempt to magnify segregated suggestions into controlling rules.

Now the fact is, that as pointed out in Robertson v. Corcoran, 125 Minn. 118, supra, which was decided after the demurrer was sustained in Minnesota, that our court had uniformly held that where part performance relied upon consisted in the rendition of services, the value of which could be reasonably measured in money, specific performance could not be granted and the promise must have recourse to other remedies that have been decided in the case.

Stellmacher v. Bruder, 89 Minn. 507.

A study of that complaint and a study of the evidence which is now in this case, reveals the fact that absolutely no pretense is made of the performance of any services by the plaintiff, after the alleged modification to make the agreement two-thirds, and the society of the children, (which seems to have been forgotten), was only kept about one year, before Mr. Smith decided that he should not impose that care upon his wife. The plaintiff had not faithfully discharged her duties as a housekeeper in her payments of bills; but had squandered his money and had discredited Mr. Smith with the tradesmen, was pawning arti-

cles of the house to send money to her husband so that he could gamble it away and Mr. Smith was supporting her and continued to support her for a long time thereafter.

The situation of the parties was such that he did not take the sort of care from her which an old and decrepit person would need from a nurse or a daughter and if she had needed it, he was not getting it. The complaint did not set forth that degree of hardship toward the plaintiff in the matter of part performance that would enable a court of equity to decree that part performance should be granted. The Minnesota court heard it on the demurrer and so decided. The Oregon court heard it upon the facts and so decided. The plaintiff's counsel must have advised her that that rule was applicable when that demurrer was sustained, else they would have prosecuted her appeal.

In addition to this, the following applicable principles show that the decision in Minnesota was right:

1. This was a contract for personal service which it was claimed was to extend over a period of more than one year, and the rule of the Statute of Frauds applied, unless there was sufficient part performance to take it out of the statute, which there was not.

2. Being a contract for service, the statute of Minnesota and the decisions of this court require that it be presented to Probate Court unless it was a case where specific performance would be required.

3. There was no element of this case as alleged or proven to take it out of the rule that if there was any contract which was a contract to act as the housekeeper of Mr. Smith and so far as it had other allegations, it was too indefinite to amount to anything.

4. Whether it was entirely a contract for personal services or whether it was a contract to include personal love and affection, neither could be enforced as against the plaintiff or as against the son for whom she had no right to contract, and therefore, there was no mutuality of remedy,

and at any stage of the alleged contract, a specific performance could be decreed under such circumstances.

5. The changed conditions of both of the parties and the inconsiderate services which the plaintiff rendered and the great amount of expense which the deceased stood in her behalf, made it inequitable to render any specific performance if there had been a contract such as claimed.

6. Her alleged contract to get a divorce was void as against public policy as we claimed at the trial.

1, 2. *Case one for Probate Court in Illinois.* It must be remembered that the District Court is the court of general jurisdiction in Minnesota. That has been uniformly held.

In Agin v. Heyward, 6 Minn. 110 (53), it was said:

> "It is, in our opinion, the one great court of general jurisdiction to which all may apply to have justice judicially administered, in every case where the constitution itself does not direct application to be made elsewhere."

The only reason, therefore, as to why the District Court would have no jurisdiction of the subject-matter would be that it was a contract for services covered by the Probate Court.

The Constitution, Sec. 1, Act 6, provides:

> "Courts—The judicial power of the state shall be vested in a supreme court, district court, courts of probate, justices of the peace, and such other courts, inferior to the supreme court, as the legislature may from time to time establish by a two-thirds vote."

And in Sec. 7 of Art. 6:

> "A probate court shall have jurisdiction over the estates of deceased persons and persons under guardianship, but no other jurisdiction, except as prescribed by this constitution."

Section 3730 of the Rev. Laws of 1905 provided:

> "All claims against the estate of a decedent, arising upon contract, whether due, not due, or contingent, must be presented to the court for al-

> lowance, within the time fixed by the order, or be forever barred: Provided, that contingent claims arising on contract, which do not become absolute and capable of liquidation before final settlement need not be so presented or allowed. * * * If the claim presented be contingent, or not due, the particulars thereof shall be stated."

The Supreme Court of the United States reversed a decision of the District Court for Minnesota in Sec. Tr. Co. v. Black River Nat. Bank, 187 U. S. 211 (L. Ed. 147), by holding that a non-resident owner of a claim against a decedent's estate could not sue the administrator in the Federal Court because he could not sue in the State Court after the expiration for filing claims expired. That was statutory as set out by the court. The court reviews the Minnesota cases and says:

> "The conclusion to which we are brought by an examination of the statutes of the state of Minnesota and of the decisions of the courts of that state in construing and applying them, is, that had a suit against an administrator of an estate been brought in the courts of that state, after the expiration of the period limited by the order of the probate courts, in which creditors may present claims against the deceased for examination and allowance, and after an allowance of the administrator's final account, and a final decree of distribution, such suit could not have been maintained."

And again:

> "It is the policy of the state of Minnesota like that of many other states to prescribe a shorter term of limitations to claims against the estates of decedents than claims against living persons. Can that policy be defeated by a ruling of the Federal courts that the provisions of the state in that regard do not a pply to parties bringing suit in those courts? In that event, the very mischief pointed out and deprecated in Yonley v. Lavender would ensue, that 'the rights of those interested in the estate who are citizens of the state where the administration is conducted are materially changed, and the limitation which governs them does not apply to the fortunate creditor who happens to be a citizen of another state.' The answer given to

> such a proposition by this court in the case just cited was: 'This cannot be so. The administration laws of Arkansas are not merely rules of practice for the courts, but laws limiting the rights of parties, and will be observed by the Federal courts in the enforcement of individual rights.' "

Without going further, it is apparent, *as a claim* on a contract, the time to present it in the Probate Court and the jurisdiction to determine it had gone.

Appelby v. Watkins, 95 Minn. 455, limits some earlier cases and holds to the rule of exclusive jurisdiction.

As to contract for services, the Minnesota Court has held that they should have been presented to the Probate Court, under the statute supra.

In Stallmacher v. Bruder, 89 Minn. 507, the Minnesota Court said:

> "A party may obligate himself to make his will in a particular way, or to give specific property to a particular person, so as to bind his estate. But the courts will be strict in looking into the circumstances of such agreements, and require full and satisfactory proof of the fairness and justness of the transaction. Newton v. Newton, 46 Minn. 33, 48, N. W. 450; Svanburg v. Fosseen, 75 Minn. 350, 78 N. W. 4. The remedy for the breach of such a contract depends upon the facts of each particular case. If the contract be an oral one to devise land, and is reasonably certain as to its subject matter and its stipulations, equity will decree specific performance, if there has been a part performance of such a character as will take a paprol agreement to convey land out of the statute of frauds, upon principles which courts of equity recognize and act upon. If the consideration for the contract be labor and services which may be estimated, and their value liquidated in money, so as reasonably to make the promises whole, specific performance will not be decreed.

So that if this contract was of the sort, which, upon the face of the complaint, could be compensated in damages, then the agreement should have been presented if there was one, to the Probate Court, and the Probate Court should have tried out the matter.

Following the Stallmacher case by that of Richardson v. Richardson, 114 Minn. 12, the Supreme Court of Minnesota denied the specific performance of an alleged contract upon the ground that the complaint did not state facts sufficient to constitute a cause of action in a case quite similar to this, except that it was alleged that the old couple made an agreement with their nephew that if he would get married and he and his wife come and live with them and render them services, love, affection, etc., that their property would be conveyed to them. The nephew got married and certain real estate was conveyed to him by the uncle and aunt, the deed was recorded and then an action was brought to set it aside. The action was dismissed and the land reconveyed and the claim made in the action now under consideration was under the alleged contract. The Supreme Court said:

> "Plaintiff refers us to Svanburg v. Fosseen, 75 Minn. 350, 78 N. W. 4, 43 L. R. A. 427, 74 Am. St. 490. In that case five opinions were written. The result and the law which determines this case was stated in Stellmacher v. Bruder, 89 Minn. 507, 95 N. W. 324, 99 Am. St. 609. The rule in that case, which we think is correct, is:
>
> "This case, we think, is governed by that rule. The labor and services rendered in this case are susceptible of fair estimate, which will fully compensate the plaintiff and 'reasonably make him whole'. The contract itself was quite indefinite. The services that were to be rendered under it, to say the least, require interpretation and explanation, especially the provision as to cohabitation."

When we think of the services that are alleged in this case and the allegation of the Richardson case, we see that that was a much stronger case than this for the services there described were as follows:

> "Those services are more specifically stated thus: That the services so rendered by plaintiff and wife as aforesaid cannot be enumerated specifically, but consist of housework of every kind and character, in obedience to the requests and directions of the deceased and defendant, all work in and about and around the house and otherwise,

of every name and nature, required in housekeeping and in running and maintaining a home, of sewing, washing, ironing, care, comforts, assistance, compay, love, affection, intimate relationship, of nursing in sickness of defendant and deceased, and much other and different kind of work, service and attention of a peculiarly personal domestic nature, describable only by the common relationship of parents and children, and of seeh character both inside and outside.

The services are ferther described in this manner: 'Further complaining, plaintiff alleges that prior to the fall of 1904, for some considerable time, the defendant and her late husband had lived alone in their said home, and were lonesome, and longed for the presence and membership of (in) their life and environment of some one or relative in whom they might have confidence, and in whose presence, cohabitation, and pe
domestic relation with them they might take comfort and better enjoy life in their old age, and so continued until deceased's death; that such lonesomeness and longing was more intense and pronounced in the winter months of the year than at other seasons thereof; that they and each of them were also during all of said time more or less sick, disabled, and infirm, and confined to bed on that account, principally during the winter seasons, and on that account, also, desired some one's residence in their home with them for personal and domestic comfort, care, nursing, company, protection, and aid, who, on account of close relationship, would be more agreeable, and closer to them, and concerned about their welfare, and attentive to their peculiarly personal and domestic wants, than the ordinary person under service or attention.'

It is alleged that plaintiff did marry, and did live with the defendants, and rendered the services described. The agreement was that if plaintiff would marry, and would live with them, with his wife, and render the services of the character mentioned, then the defendants would leave and give him all their property. Relying on this promise, plaintiff did marry and render the services mentioned—'served them as a son would his father and mother, and in the same personal domestic relation."

The Minnesota Rule as to this Case.

The same rule was taken up in Haubrich v. Haubrich, 118 Minn. 394, in *a case that looks as if the theory of it might have been quoted from that of the plaintiff's case in Minnesota.* The case was tried by the court and a finding made that there was no contract. The opinion says:

> "The court also made findings of evidentiery facts to the effect following:
>
> The deceased, in 1885, married the plaintiff's mother, Alvena Krause. The plaintiff was then some five years old. He went with his mother to the home and farm of the deceased, who had no children, and was given the name of Max Haubrich. Thereafter, and until his mother's death all three of them lived on the farm as one family. The plaintiff during such time conducted himself and was treated in all respects as the son of the deceased. He went to schoo lin winters, and the rest of the time he did chores and worked on the farm as otherb oys in the neighborhood did for their parents. After the death of the mother, the deceased and the plaintiff continued so to work and live together on the farm until June 1, 1906, when the plaintiff went to North Dakota. He there took land under the United States homestead laws by filing thereon, returning in about ten days. In November thereafter he went back to his homestead, and resided thereon for one year, when he commuted and proved up on his homestead, paid for the land, and again returned to the deceased an dhis farm. In the fall of 1908 he was absent, working for his own benefit in St. Paul and Minneapolis, for two or three months. Immediately prior to April 1, 1909, he was in Minneapolis for some two months; but on that date, and seventeen days before the deceased died he returned to him and remained with him until his death on April 18, 1909. The deceased, after the death of his wife, on many occasions and at many different times, using various forms of expression, said in substance that he would give or leave all his property to Max when he died, and that the boy, Max, would get or have it all when he died, and he intended that Max should have all his property at his death, but whether this should be by deed or will, or he thought Max as his stepson, would inherit it, is not

clear, and is not found. Plaintiff received from the deceased, after June 1, 1906, the sum and value of $1,300 in money and personal prpoerty, either as a gift, or in payyment of the labor and services done or rendered by him to the deceased, who died intestate, and did not leave or give to the plaintiff any of his property, except the $1,300.

The trial court as a conclusion of law directed judgment for the defendants, to the effect that the plaintiff take nothing by his suit, and that he had no title to or interest in any of the property left by the deceased.

The plaintiff's assignments of error raise the question whether the facts found sustain the conclusion of law, and whether the findings of fact are sustained by the evidence.

The law applicable to these questions to too well settled to justify any extended discussion. A party to a contract may obligate himself to make his will in a particular way, or to give specific property at his death to a particular person, so as to bind his estate; but courts will require full and satisfactory proof of such contracts and of the fairness of the transaction. The remedy for breach of the contract depends upon the circumstances of each particular case. If it be an oral contract, and its subject-matter land, equity will decree specific performance, if there has been such part performance as will take an oral agreement to convey land out of the statute of frauds. Specific performance of the contract will not be enforced, where the consideration is labor and services which may be estimated and their value liquidated in money.

If the facts found by the trial court are sustained by the evidence, we are clearly of the opinion that they support the conclusion of law and justify the judgment for the defendant.

The only debatable question presented by the record is whether the evidence sustaines the controlling findings of fact; the primary one being that the alleged contract was not made. The plaintiff called several witnesses, who severally testified to the effect that the deceased repeatedly state that the plaintiff should have all his property when he died. The fair inference from this evidence is that stated by the learned trial judge in his findings of fact. There was, on behalf of the defendants, evidence tending to show statements

> by the plaintiff to the effect that there was no agreement between him and the deceased as to payment for plaintiff's services. We have carefully considered all of the evidence, and find that it fearly sustains the findings of fact."

Certainly the services that were rendered in that case were much more in accord with the alleged contract, a much greater fulfillment of it and altogether more in accord with the conduct of the parties; yet they were insufficient.

> But to authorize a court to bequeath a specific performance of an oral contract to give property by will the contract must appear reasonable, and be clearly and satisfactorily established; and it must also have been performed, on behalf of the beneficiary, to such extent and in such manner that he canot be compensated properly in damages. If the part performance relied upon consisted in the rendition of services, the value of which can reasonably be measured in money, specific performance will not be enforced and the promisee must have recourse to other remedies. Stellmacher v .Bruder, 89 Minn. 507, 95 N. W. 324, 99 Am. St. 609; Richardson v. Richardson, 111 Minn. 12, 130 N. W. 4; Haubrich v. Haubrich, 118 Minn. 394, 136 N. W. 1025."

The court in that case then announced that under certain circumstances specific performance may be decreed and then points out that they could not tell under which rule the case would come until the evidence was taken, but that the District Court had jurisdiction of the matter.

The case of Robertson v. Corcoran, 125 Minn. 118, decided in 1914, follows the same rule. This alleged contract then was never made, as we view it; but if it had been made it was for services only. The Minnesota Court so concluded and there have been no reversals. Right or wrong, that is the law of the case.

3, 4. 5. *SPECIFIC .PERFORMANCE IN FEDERAL COURT* WILL ONLY BE GRANTED TO A PARTY WHO HAS NOT BEEN IN DEFAULT, OR WHO HAS NO ADEQUATE REMEDY AT LAW, OR WHERE THERE IS MUTU-

ALIY OF REMEDY AND AN ADEQUATE CONSIDERATION.

In Rutland Marble Co. v. Ripley, 10 Wall, 339 (L. Ed. 955), Mr. Justice Strong said:

> *"Such a decree is not a matter of right, it rests in the sound discretion of the court and, generally, it will not be made in favor of a party who has himself been in default.* In Story's Equitable Jurisprudence, Sec. 736, it is said that 'In cases of covenants and other contracts where a specific performance is sought, it is often material to consider how far the reciprocal obligations of the party seeking the relief have been fairly and fully performed. For, if the latter have been disregarded, or they are incapable of being substantially performed on the part of the party so seeking relief, or from thei rnature they have ceased to have any just application by subsequent events, or it is against public policy to enforce them, courts of equity will not interfere.' To the same effect are Smith's Principles of Equity, 220; Thompson v. Tod, Pet. (C.C.), 380; Lewis v. Wood, 4 How. (Miss.), 86, and many other cases."

And again:

> *"Another reason why specific performance should not be decreed in this case, is found in the want of mutuality. Such performance by Ripley could not be decreed or enforced at the suit of the Marble Company, for the contract expressly stipulates that he may relinquish the business and abandon the contract at any time on giving one year's notice. And it is a general principle that when—from personal incapacity, the nature of the contract, or any other cause—a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former. Fry Spec. Perf., Sec.* 286."

The Circuit Court of Appeals for the third circuit in Tanssig v. Corbin, 142 Fed. 660-666, said:

> *"It has long been a settled rule of equitable procedure, that specific performance of a contract will not be granted by the court (to whose judicial dis-*

cretion the latter is always submitted), unless the remedy be mutual, or if the contract be otherwise unequal. On this ground, in a large class of cases, this remedy is denied, because, however possible specific performance may be of that side of the contract which is presented for enforcement, such remedy was not open to the defendant against the plaintiff. This remedy is denied by courts, where there is a contract of continuing personal service. As courts cannot practically and justly compel the performance of personal service, at the suit of the one to whom such service is due, so they will not, at the suit of the one from whom such service is due, enforce the other side of the contract, even though no practical difficulty presents itself to such enforcement."

The Circuit Court of Appeals of the eighth circuit is likewise on record with amplifications of the rule. In Shubert v. Woodword, where the contract was for services, 167 Fed. 47, said:

> *"The specific performance of a contract by a court of equity is not a matter of right. It rests in the discretion of the court, not in its arbitrary whimsical will, but in its sound judicial discretion informed and directed by the established principles, rules, and practise of equity jurisprudence. Hennessey v. Woolworth, 128 U. S. 438, 442, 9 Sup. Ct. 109, 32 L. Ed. 500. Nor are these principles and rules and this practice hard, fast or without exception. They are rather advisory than mandatory, and the application of the rules and of their exceptions to each particular case as it arises is still intrusted to the conscience of the chancellor. Yet these principles and rules and this practice serve to inform the intellect and to enlighten the conscience and by them the judicial discretion of the court must be guided. .Federal Oil Co. v. Western Oil Co., 121 Fed. 674, 676, 57 C. C. A. 428.*
>
> Specific performance will not ordinarily be decreed in favor of a party to a contract against whom the court cannot efficiently compel its performance. The obligation and the remedy under the contract must be mutual. 2 Beach on Contracts, 885, and not 1; Marble Co. v. Ripley, 10 Wall, 339 358, 19 L. Ed. 955; Fry on Specific Performance of Contracts (3d Ed.), Secs. 440, 441; Welty v. Jacobs, 171 Ill. 624, 49 N. E. 723, 40 L. R.

> A. 98; Lancaster v. Roberts, 144 Ill. 213, 33 N. E. 27; Chicago Municipal Gas Light & Fuel Co. v. Town of Lake, 130 Ill. 42, 60, 22 N. E. 616; Ogden v. Fossick, 32 L. J. Eq. (N. S.), 73; Buck v. Smith, 29 Mich. 166, 18 Am. Rep. 84 Richmond v. R. R. Co., 33 Iowa, 422. * * * But it is both unreasonable and unjust for a court of equity to constrain one party to an agreement to specifically perform it when it is without power to compel the other party to do so and he may escape its performance at will, and the general practice as well as the weight of authority sustains the rule.

In Lindeke v. Converse, 198 Fed. 618-623, the eighth C. C. A., in speaking of diemfwyeptn, said:

> "It is an immemorial principle of equity jurisprudence that nothing but conscience, good faith, and reasonable diligence can call a court of equity into action."
>
> "It is obvious that a wise and just administration of this law requires that such issues shall be framed and tried before the memory of the witnesses familiar with the transactions of the bankrupt at and shortly before the time of his adjudication has been dimmed by long delay and before they and the documentary evidence surrounding these transactions have been scattered and lost.

If a court of equity has no jurisdiction, then the Federal Court will not keep the case to assess damages.

In this second case we find that one witness to the will of 1902 and another to the last will, and Mr. Bell who kept the last will had died and Arthur Smith had run away before this trial and that the second case was never seasonably brought.

Blue Point Oyster Co. v. Hoagman, 209 Fed. 278 (Wash.).

The *matter is set at rest for this court* by the decision in Pantages v. Grauam, 191 Fed. 317 (9 C. C. A.), by an opinion by His Honor, Judge Wolverton, 191 Fed. 317-323-, when the court said:

> "It is a fundamental principle that specific performance of a contract will not be decreed unless it can be rendered obligatory upon both parties. In other words, the remedy must be mutual; other-

wise, it cannot be invoked. Marble Co. v. Ripley, 10 Wall, 339, 19 L. Ed. 955; Firth v. Ridley, 33 Beavan's R. 516; Shubert v. Woodward, 167 Fed. 47, 92 C. C. A. 509; Duff v. Hopkins (D.C.), 33 Fed. 599, 608; Pullman Palace Car Co. v. Texas & Pac. R. R. Co. (C.C.), 11 Fed. 625. Nor, it is held, will the remedy avail unless both parties at the time the contract is executed have the right to resort to equity for its specific enforcement; Norris v. Fox et al (C.C.), 45 Fed. 406. The principle has been carried into the statutes of California, and is enforced by its courts. Pacific Electric Ry Co. v.

And again:

> "So equity will not award specific performance where the duty to be enforced is continuous and reaches over a long period of time, requiring constant supervision by the court. Pacific Electric Ry. Co. v. Campbell-Johnston, supra."

In Town of Glenwood Springs v. Glenwood Light & W. Co., 202 Fed. 678-684, the court said at page 684:

> "And courts of equity will not ordinarily compel the specific performance of a contract, either by decree or by an injunction against its violation, at the suit of a party who is guilty of a substantial breach of it. Shubert v. Woodward, 167 Fed. 47, 57, 92 C. C. A. 509, 519; Marble Co. v. Ripley, 10 Wall. 339, 358, 19 L. Ed. 955; Taussig v. Corbin, 142 Fed. 660, 667, 73 C. C. A. 656, 663."

All of these points are applicable here, to the alleged contract on trial.

A long delay.

Insufficient consideration.

Indefiniteness.

Change of conditions.

Remedy at law.

Want of mutuality of remedy.

VIOLATION OF THE POLICY.

This complaint came within the rule of no mutuality. There can be no question but that the rule of mutuality is a necessity in cases of specific performance in Minnesota for the rule was laid down in the case of Alworth v. Seymour,

12 Minn. 526, by Judge Mitchell, the same effect as the Federal decisions.

That was a case of a demurrer to the complaint which was overruled by the court below; it was there claimed that defendant was a resident of Ontario, Canada, and was the widow of Pat Seymour, late of Brainerd, Minn. He died intestate seized of certain lands in Brainerd and Duluth and possessed of at least $3,000 in personal property. It was averred that the lands were, on April 12, 1889, and ever since, in the possession of other persons claiming to own them, and that the defendant never had the means wherewith to establish her title; that until June, 1889, she had no knowledge or means to discover the property left by her husband; that plaintiff was in the abstract business, examining and perfecting defective titles; that by letter of April 12, 1889, he offered "to do all the work of looking up the property in which defendant has an interest, and settling it up, pay all expenses connected therewith, for defendant, without charge to her unless plaintiff should succeed therein; and, in case of success, defendant should divide the property or money obtained equally with plaintiff, first deducting from the gross proceeds the necessary expenses and disbursements of plaintiff therein."

The defendant accepted that offer by letter, retained attorneys to help him in the work of prosecuting litigation performing services worth $100; became liable to attorneys for services of another $100, but the defendant refused to proceed with the work under the agreement and repudiated it, and gave to another person a power of attorney to convey all of her interest in Minnesota lands; her interest in her husband's lands was worth $25,000. She had no other means and the action was brought to compel her to specifically perform the agreement and to enjoin her from parting with any of her husband's lands until she complied with it, and to have the contract made a lien upon the lands.

Judge Mitchell said:

> It being, therefore, a case of a mere agency or naked power, the defendant had the power (as distinguished from the right) to revoke it at any time. Of course if she revoked it without right, plaintiff would have his action for damages for breach of the contract, if a valid one. Mecham, Ag. §§207-209; Huntv. Rousmanier, 8 Wheat, 174; Gilbert v. Hol, es, 64 Ill. 548; Hartley's Appeal, 53 Pa. St. 212; Barr v. Schroeder, 32 Cal. 609. (2) But, even assuming that the contract created a 'power coupled with an interest,' still the court would not decree specific performance, because, from the very nature of the contract it would not enforce complete performance by both parties. In other words, there is no mutuality of remedy. It calls for the personal services of the plaintiff as agent for the defendant. These services are as yet mainly unperformed. The court has no power by its decree to compel him to perform them, much less to direct how he shall perform them; and specific performance will not be decreed unless the court can at the time enforce the contract on both sides, so that the whole agreement will be carried into effect according to its terms. If this cannot be judicially secured on both sides it ought not to be compelled on one side, and the other party left at liberty to perform or not, or to perform in such a way as suits his own interests. Fry. Spec. Perf. §§ 440; Pom. Eq. Jrr. §1405, and nots. Pom. Spec. Perf. §§165, 166."

A further discussion of this question appears in Palmer v. Gould, 39 N. E. 378, in the New York Court of Appeals in the transaction of a sale.

And again in Ida v. Brown, 70 N. E. 101, it was claimed that a guardian had agreed with his ward, who continued to live as a member of a family with a person with whom she had always lived, in the position of a daughter, but this was held to furnish no consideration for a promise by such person to bequeath to her at his death a specific sum and devise to her the house and lot in which he lived so that upon his death with a failure to fulfill that promise, equity could decree specific performance. There are three opinions in that case, one by Judge Haight, who points out the diffi-

culties about an agreement being made under those circumstances to involve a child long after it reached its majority.

The same difficulties certainly prevail as to a married woman or as to contracting as to her children, although the opinion of Judge Gray seems to turn somewhat upon want of power and had promised to treat him as a son and had also stated that whatever worldly wealth he had should be divided equally between this boy and the two daughters.

The court said:

> "Assuming that the trial judge believed that the appellant and his mother intended to tell the truth, still, owing to their deep interest, it would be unsafe to base a finding on their testimony when it may be followed by such grave consequences."

In this connection, it may not be amiss to call the Court's attention to the fact that there is probably no other line of cases claimed to depend upon contract wherein the evidence of an oral nature is so uniformally consistent, and why? Is it because the parties who make those contracts are more consistent in their logical arrangements? Judges of trained minds differ more in their reasoning and more in their statements of cases than the statements of facts claimed to be contracts of an oral nature in the average cases where specific performance is asked. Such cases are dangerous as this similarity of evidence indicates. They are similar in that their testator is dead and cannot speak from his grave; they are similar in a disposition on the part of those who are not otherwise lawfully entitled to the estate to claim an interest; they are similar in that the dangers of being caught at misrepresentations are far less than in most cases; they are similar in that the lines of demarkation as to when specific performance is meant upon the theory of part performance have been well known where the case has gone the ordinary trend without delving into the basic principles underlying them.

The case was meant to be similar in the complaint, but the plaintiff could not fully stand up to it.

The Ide case is illuminative. It points out the comments of Chancellor Kent on stare decisis, as follows:

> "He added that 'it is probable that the records of many of the courts of this country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired and the beauty and harmony of the system destroyed by the perpetuity of error.' 1 Kent's Com. (13th Ed.), 477."

Continuing, Judge O'Brien says later on in his opinion:

> "When the testator made the will disposing of his estate, he supposed that the law of the land was that he had the right to do what he would with his own, but in this, it seems, he was mistaken. He did not suppose that his will could be destroyed by calling a single witness to testify to a verbal interview with the testator, wherein it is said he promised to make another and better will. It seems from this case that the witness was not able to state the words of the interview, but only what he calls the 'spirit and sentiment', and, that having been made to appear in the way suggested, a court of equity is asked to proceed and tear up the will as made, and substitute the verbal arrangement in its place, in whole or in part. If this can be permitted, it is pertinent to ask what becomes of the sacred right to make a will and have it respected, which this court asserted with so much vigor in Dobie v. Armstrong, 160 N. Y. 584, 55 N. E. 302? Of course, no man, old, rich and childless, can safely make a will, if it is always to be open to attack after his death, not, as heretofore, on the ground of incompetency or illegality of its provisions, but upon some kind of vague proof of a verbal arrangement to change it, or to make another will more favorabel to strangers in blood, who may think they are equitably entitled to share in the estate.

Again in Wadick v. Mace, 83 N. E. 571, the Court of Appeals of New York said:

> In the various text-books and innumerable cases which deal with the subject of specific performance no rule is more clearly or positively stated than the rule that a contract must be mutual in its remedy in order to warrant a degree for specific

> performance thereof. "It must be in general," says Prof. Pomeroy, "mutual in its obligation and its remedy." 4 Pomeroy's Equity Jurisprudence (3rd Ed.), § 1405. This statement has been quoted with approval again and again by the courts in this and many other states. The same learned author, in another work, declares that, if a contract cannot be specifically enforced against one of the parties, then and for that reason he is not entitled to the remedy of specific performance against his adversary. Pomeroy on Contracts, § 163. In Palmer v. Gould, 144 N. Y. 671, 39 N. E. 378, the court declared it to be a well settled rule that the specific performance of a contract for the sale of lands will not be decreed if the remedy be not mutual. The same doctrine was asserted by this court in Stokes v. Stokes, 148 N. Y. 708, 43 N. E. 2211, Mahaney v. Carr, 175 N. Y. 454, 67 N. E. 903, and Ide v. Brown, 178 N. Y. 26, 39, 70 N. E. 101."

As stated by Judge Thayer in Norris v. Fox, 45 Fed. 406-407:

> "The rule is fundamental that a contract will not be specifically enforced unless it is obligatory on both parties, nor unless both parties at the time it is exe,ut edhave the right to resort to equity for is executed have the right to resort to equity for its specific enforcement. Marble Co. v. Ripley, 10 Wall. 340; Bodine v. Glading, 21 Pa. St. 50; Duball v. Myers, 2 Md. Ch. 401; German v. Machin, 6 Paige, 286; Boucher v. Vanbuskirk, 2 A. K. Marsh, 345; Duff v. Hopkins, 33 Fed. Rep. 599-608. And where a contract when executed is not specifically enforceable against one of the parties, he cannot, by subsequent performance of those conditions that could not be specifically enforced, put himself in a position to demand specific performance against the other party."

Certainly nobody can contend in this case in the light of these decisions that there was any mutuality of remedy at the time this alleged contract was claimed to have been made with Peter B. Smith, nor was there any mutuality of remedy or specific performance at the time when the alleged modification is claimed to have been made.

Not Enforceable as Against a Wife.

Specific performance of such a contract will not be granted against a wife who marries after it is made.

Mr. Smith did not tell her of such deal, but that Bess and the boys would undoubtedly leave soon, (Rec., p. 470).

Ownes v. McNally, 33 L. R. A. 369 (California).

In the above case, the court had such a contract under consideration, and said:

> "A specific performance of this contract cannot, therefore, be decreed without sweeping aside, as of no moment or avoid, the rights of the wife and widow, vested under a contract most strongly favored by the law. Specific performance, as we have said, is not to be decreed under strict rule and formula. Every consideration which may properly be urged upon the court is to be weighed and passed upon, and it will be decreed only when no other adequate relief is available to plaintiff, and even then it will be denied if it operates by way of a hardship upon the innocent. So, while this contract was not void, as against public policy, at the time it was entered into, it must be held that the parties to it contracted in view of the fact that a subsequent marriage by Lawrence McNally might be consummated, and that the effect of this marriage would be to compel a court of equity, in justice to the widow or children, to deny specific performance. Or, viewed in another way, it must have been within the contemplation of the parties that Lawrence McNally might marry; for the contract could not have been designed as a restraint upon his marriage, or it would be void. If it was within their contemplation, and the contract embraced the taking of the deceased's entire estate to the exclusion of any future wife or child, then we have no hesitation in saying that the contract was void as against public policy. The only permissible conclusion is, therefore, that the parties contracted in contemplation of that event. Upon its happening the rights of innocent third parties intervened, and a decree of specific performance could not be awrded. Gally. Gall, 46 N. Y. S. R. 806." Owens v. McNally, 33 L. R. A. 369-373.

If there was an agreement it involved getting a divorce and was void.

The plaintiff's evidence quoted above gave as the consideration for the alleged agreement that she should get a divorce, (Rec., pp. 317-318), not the charge made in either complaint and we objected there on the ground of variance and public policy, (Rec., p. 492).

Undoubtedly, it is the rule of Minnesota, as elsewhere, (9 Cyc. 519), that such an agrement is void as against public policy.

> Adams v. Adams, 25 Minn. 72 (9 Cyc. 519, note 12).
> McAllen v. Hodge, 94 Minn. 237.

PUBLIC POLICY OF MINNESOTA.

The General Statutes of 1894, with respect to personal property, were compiled from Section 70, Chapter 46, of the Laws of 1889, as amended by Section 6, of Chapter 116 of 1893.

This Section 70 is out of the chapter designated 46, which in fact is what is known as sub-chapter 4 of Chapter 46, better known as "An Act to Establish a Probate Code."

This Section 70, as it read in the Probate Code thus established, was as follows:

> "When any person dies possessed of any personal estate, or of any right or interest therein, not lawfully disposed of by his last will and testament, the same shall be applied and distributed as follows:
>
> 6. The residue, if any, of the personal estate shall be distributed in the same proportion and to the same persons and for the same purposes as prescribed for the descent and disposition of real estate."

It is noticeable that this statute excepts only that descent made by a last will and testament and puts it in the same persons and in the same proportions and for the same purposes as to real estate.

When the General Statutes of 1894 put this provision into 4477, an error was made as to codifying this with the amendment which had been made in 1893.

That amendment in 1893 struck out of section 70, before

the first subdivision thereof, the words "not lawfully disposed of by his last will and testament," which may have looked significant had it not been that it added to the Section 6: "(Except as otherwise disposed of by the last will of any deceased person."

This probate code was enacted in 1889. The amendment made in 1893, and the striking out of the clause in Section 70 at the head thereof might indicate that it was the purpose to deprive all the other legatees of the benefit of the clause, but to preserve it to the widow and the heirs at law, the same as it would be preserved in real estate, in order to protect the magainst such actions as this.

DESCENT.

The General Statutes of Minnesota for 1905, Sections 3646, etc., provide for the descent of property where there is no will:

> "When any person dies seized of any lands"
> * * * * *
>
> "The homestead of such decedent shall descend, free from any testamentary or other disposition thereof, to which the surviving spouse, if there be one, shall not have consented in writing, and exempt from all debts which were not valid charges thereon, at the time of such death, as follows:
>
> 1. If there be no surviving child, nor lawful issue of any deceased child, to the surviving spouse, if any."

Section 3648 of the Revised Laws provides:

> "The surviving spouse shall also inherit an undivided one-third of all other lands of which decedent at any time during coverture was seized or possessed, to the disposition whereof, by will or otherwise, such survivor shall not have consented in writing."

Then follow certain exceptions which do not include any such exception as Mrs. Price attempts to ingraft upon our statute.

A provision is then made for the children, and then it is provided that if there be no children:

"Then the whole estate shall descend to such spouse."

Section 3649 gives to the surviving spouse the privilege of electing to take under the statute or by will.

Under the General Statutes of 1894, of subdivison 6, including the former amendment to Section 70 of the Probate Code of 1889, it was held in the Supreme Court in the case of Percy v. Hunt, 88 Minn. 404, that it does not prohibit the husband from disposing of his personalty by will. To avoid this necessity when the laws of 1905 were revised, subdivision 6 was so amended as to make it read as follows:

> "The residue, if any, of the personal estate shall be distributed as follows: one-third thereof to the surviving spouse, if any, free from any testamentary disposition thereof to which such survivor shall not have consented in writing; the remainder of such residue, or, if there be no surviving spouse, then the whole thereof, except as otherwise disposed of by will, shall be distributed in the same proportions to the same persons and for the same purposes as prescribed for descent of real estate by Sec. 3648, subd. 1-6."
>
> Subd. 6 of Sec. 3653, Revised Laws Minn. 1905.

This makes it exceedingly clear that under the laws of Minnesota as they now stand a husband cannot even will away more than two-thirds of the personal property without the consent of the wife in writing thereto, and that he cannot dispose of it in an other manner than by will to prevent her taking the whole thereof where there are no children.

Section 3653 provides:

> "When any person dies owning personal property or any interest therein, the same shall be disposed of and distributed as follows:
>
> (After making certain provisions as to the wearing apparel, debts, etc., it is provided in subdivision 6:)
>
> The residue, if any, of the personal estate shall be distributed as follows: one-third thereof to the surviving spouse, if any, free from any testamentary disposition thereof to which such sur-

> vivor shall not have consented in writing; the remainder of such residue, or, if there be no surviving spouse, then the whole thereof, except as otherwise disposed of by will, shall be distributed in the same proportions to the same persons and for the same purposes as prescribed for descent of real estate by Sec. 3648, subd. 1-6."

The mere reading of this section shows us that it is the policy of the State of Minnesota that the homstead shall descend, where there are no children:

> "Free from any testamentary or other disposition thereof to which the surviving spouse * * * shall not have consented in writing."

It is also clear from this section that it is the purpose that this homestead shall descend to the surviving spouse free from debts.

As to the other lands which are made subject to the payments of debts, it is provided that:

> "The whole estate shall descend to such spouse" * * * of all lands * * * "to the disposi- whereof by will or otherwise such survivor shall not have consented in writng."

The mere reading of this statute would also indicate the policy of the statute of Minnesota to be that the wife should receive these lands as a matter of law whether the disposition be made "by will or otherwise."

This section is amended by the General Laws of 1907, Chapter 36, which does not materially affect this question.

As to the personal estate it provides that it, too, shall descend free from any testamentary disposition to which "such survivor shall not have consented in writing."

Under section 3649 it is provided in effect that unless she renounces the will within six months, in writing, "such spouse shall be deemed to have elected to take thereunder."

This section is the outgrowth of our previous statutes, recognizing the principle that the wife may elect to take these statutory provisions even though the will be made to her of less favorable conditions.

It is perfectly clear from these statutes themselves, unless there be some unintentional, judicial obstructions under the so-called theory of interpretation, that it is the policy of the State of Minnesota with respect to the descent of real estate, and with respect to the descent of personal property, that the spouse shall, as a matter of law, be entitled to choose whether she will take under the will or shall elect to take under the statute; and that if she does elect to take under the statute, no disposition of such property to which she has not consented in writing, whether made by will or otherwise, as to the real estate, shall affect her rights; and that she shall be entitled to the residue of the personal property free from any testamentary disposition to which she has not "consented in writing."

As this law read with respect to the personal property in the statutes of 1894 it was:

> "The residue, if any, of the personal estate shall be distributed in the same proportion and to the same persons and for the same purposes as prescribed for the descent and disposition of real estate."

There was an omission in the print as it should have had following it, by chapter 116, section 6, of the Laws of 1893, an amendment which would have added to the end thereof:

> "Except as otherwise disposed of by the last will of any deceased person."

This makes it perfectly clear that it was the intention of that act in that amendment to allow this property to descend under such circumstances, unless disposition was made of it by will.

By chapter 36 of the General Laws of 1907, section 3648 of those laws is again amended as to real estate, again showing the policy of the state to be, that where there is no child, or issue of a child, and a surviving spouse, the land shall go to the spause, except in cases where the spouse has con-

sented in writing by will or otherwise, with the few exceptions therein mentioned.

In Howe Lumber Co. v. Parker, 117 N. W. 518, in speaking of the policy of the law of Minnesota with respect to the widows' rights under our statute, Mr. Justice Elliott says:

> "The general policy of the law contemplates that the wife shall take either as widow under the statute or as legatee under the will. A condition by which she takes in part under the will and in part under the statute is anomalous, but nevertheless permissible, if such is the desire and intention of the testator. In order to avoid such results being brought about by doubtful construction, the legislature in 1893 amended the statute which provided for an election by a surviving husband or wife by adding thereto a proviso to the effect 'that no devise or bequest in any last will or testament to a surviving husband or wife shall be taken to be in addition to the right or interest secured to such survivor by statute in the estate of such deceased person, unless such clearly appears from the contents of the will to have been the intention of the testator or testatrix.'"
>
> Howe Lbr. Co. v. Parker, 117 N. W. 519.

This fixes the opinion of our Supreme Court so that the policy as it sees it is the same way as we here construe it.

In connection with these decisions, the opposite to which we have not found, when a wife is involved, voicing as they do the sound principle of public policy, we have but to see if it is consistent with the policy of Minnesota, as evidenced by our legislative department; for the legislative and not the judicial department is the one having the first right to act upon questions of public policy.

The policy of a state is made by its constitution, laws and decisions. If the political department speaks within its constituional authority, it binds the courts.

> See Board of Sup. v. L. I. & C. Co., 93 U. S. 619.
> Hartford Ins. Co. v. C. M. & St. P. Ry. Co., 70 Fed. 201 (30 L. R. A. 193).
> U. S. v. Trans. Mo. Freight Assn., 166 U. S. 341.
> U. S. v. No. Sec. Co., 120 Fed. 721.

Judge Sanborn in the case of Hartford Fire Ins. Co. v. C. M. & St. P. Ry. Co., 70 Fed. 201, (30 L. R. A. 193), speaking for the court of appeals, said:

> "'The public policy of a state or nation must be determined by its constitution, laws, and judicial decisions; not b ythe varying opinions of laymen, lawyers, or judges as to the demands of the interests of the public. Vidal v. Philadelphia, 43 U. S. 2 How. 127, 197, 11 L. Ed. 205, 233; United States v. Trans-Missouri Freight Assn., 7 C. C. A. 15, 73, 58 Fed. Rep. 58, 24 L. R. A. 973, 4 Inters. Com. Rep. 443, Swann v. Swann, 21 Fed. Rep. 299.'
>
> "Hartford Fire Ins. Co. v. C. M. & St. P. Ry. Co., 70 Fed. 201 (30 L. R. A. 193)."

Now the policy of Minnesota has been declared by its legislative department. It has pointed out in that department by statute that the State of Minnesota will not tolerate the making of a will which will deprive a widow of more than two-thirds of the personal property, without her consent, and that it will not permit a disposition of any portion of the personal property away from the wife, where there are no children, *except by will.*

The statutes of this state—consequently the public policy—prohibit the making of a will except as above shown; they also prohibit such contracts because:

(a) They provide that the wife may elect to take her statutory interest in lieu of the will.

(b) The real estate cannot be taken from her by will or otherwise—when no children—without her written consent.

(c) Only two-thirds of the personal property could now be taken from her by will, and none of it *except by will.*

THE PUBLIC POLICY OF MINNESOTA AGAINST SUCH CONTRACTS IS THUS FIXED.

No more dangerous principle could be established than to allow a rule once invoked to prevent peculiar hardships to be so extended as to allow innocent wives and children to be deprived of their support by the oral testimony of a married woman, who perchance may have been the object

of general contributions, but who yet has a father and one divorced husband to aid her.

IF A WILL WAS MADE IT COULD NOT BE REVOKED BY SUCH ALLEGED CONTRACT.

It is also provided by section 3665 as follows:

> "No will in writing, except in the cases hereinafter mentioned, shall be revoked or altered otherwise than by some other will in writing, or by some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, cancelled, obliterated, or destroyed, with the intent and fo rthe purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and when so done by another person the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses; but nothing in this section shall prevent the revocation implied by law from subsequent change in the condition or circumstances of the testator."
>
> Section 3665, R. L. 1905.

By section 3666 it is provided:

> "If, after making a will, the testator marries, the will is thereby revoked."

This matter of public policy seems not to have been raised in the Minnesota Supreme Court decisions. Neither has the point of no mutuality.

MINNESOTA DECISIONS NOT MINNESOTA LAW.

The case of Newton v. Newton, 46 Minn. 33, was decided in 1891. It was evidently decided without any reference to this statute and without the point of public policy or statutes being raised, but upon an old line of equity cases, and upon the theory that that contract was as valid as any other contract.

The point of statutory prohibition or that of public policy was not mentioned in the opinion.

An examination of the brief of appellant confirms the opinion in showing that the point was not raised.

The question of enforcement of such contracts next came before the court in Svanburg v. Fosseen, 75 Minn. 350. In that opinion Judge Buck says that the questions were:

1. Statute of frauds.
2. Did the probation prohibit the action?

Again the court rests its decision upon cases of other courts not even having the Newton case mentioned in the opinion. The five opinions in that case do not mention either the statutes or the Newton case.

The Newton case was cited in respondent's brief.

In the brief, section 4423 of the Statutes of 1894 to the general statement that he was bound by the contract; but even this was under the heading which simply raised the question of whether the will when probated was conclusive.

The statute is not cited by the appellant to our contention and the point was not decided. This decision was in 1899.

The first Foseen decision was on demurrer where a stipulation was made by others to abide by the result. The case was brought up for trial and was dismissed by Judge McGee for defect of parties. The Supreme Court, in Rudd v. Fossum, 82 Minn. 41, reversed the decision upon that ground, saying.

"Passing all other questions," etc.

Our point was not made in that decision.

The briefs do not raise the question.

The question of such contract next approved in the Supreme Court in Stellmacher v. Bruder, 89 Minn. 507. The opinion cites the Newton and Forseen cases; it denies specific performance on the facts.

The consent of the father was there obtained.

The respondents make the point of public policy without citing any statutes or authorities to it.

The other Minnesota case is that of Laird v. Vila, 93 Minn. 45. The court cites itself in the other cases to show that the rule is decided. It does not cite the statute upon the point.

The briefs do not make our point.

Strange as it may seem, these statutes seem to have been overlooked by the profession and ignored by the court in the all pervading search for precedents as distinguished from law.

None of the cases in Minnesota, so far as we can find, and we believe no former ones, pretend to discuss any of the questions from the standpoint of public policy, under such statutes, or the fact that the statute is the exclusive method, but they seem o rely upon the old cases where no such statutes existed and where no such public policy had been manifested.

These statutes could have had no other purpose than to prevent just such actions—to declare a policy which would protect families irrespective of other claims.

All lawyers of experience, as well as all thoughtful legislators, have observed that unscrupulous persons feel that estates of the deceased are legitimate prey for violated oral promises, the truth of which they believe is sealed with the lips of the dead.

But to secure the orphans' bread and the widow's peace and honor, the state says *no*, her laws say *no*, the court must say *no*.

Add to this the policy with respect to marriage, the duties of a wife to her own husband, and the dangers of such litigations cannot be over-estimated.

III.

THE TRIAL COURT APPLIED THE PROPER RULES OF EVIDENCE AND MADE THE RIGHT DECISION.

We call attention, therefore, to the following things:

1. The decision below, which is found in Price v. Wal-

lace, 224 Fed. 576, is correct in its interpretations of the rules of evidence and principles of law and the facts of this case; and it is substantial justice on the merits.

2. The matter of the admission or the rejection of evidence under those circumstances, as previously pointed out, is immaterial, for it would not have varied the results.

The alleged third error, amounts to nothing.

Counsel, without citations to the record, challenge the refusal of the court to admit a letter of one C. A. Brown. If we turn to the record, we find that he produced that letter as Exhibit F, (Rec. p. 445), and asked the defendant if Mr. Brown was authorized to speak for her and was given a negative answer, (Rec. p. 445), and he produced no evidence whatever of any relations between Mr. Brown and the defendant or any authority to speak for her, or any knowledge of accuracy, but presented the letter itself, and offered it in evidence, and upon our objections, (Rec. p. 445), the court properly ruled it out. (Rec. p. 446). Counsel has an exception there although he had not pointed it out in his assignment of errors, or argument, so far as we have observed.

Under these circumstances, we observe that this document is the worst sort of hearsay, and is clearly immaterial and lacks foundation as much as the letter of any third party could lack those things under any circumstances in any lawsuit. If the plaintiff could have presented this letter, then the defendant could have written to various people throughout the United States, telling them of the way in which she had been mistreated by the plaintiff and could have gained their sympathy without any hearing from her or if she had not have gained their sympathy, could have obtained letters couched in diplomatic language in the hope of ending the lawsuit, and could have presented those letters as evidence in behalf of the defendant. This letter is so utterly foreign to any principle of evidence in the American courts as to require absolutely no discussion; but whether

its exclusion was right or wrong, is wholly immaterial, for it could not have affected the result of this lawsuit. There was nothing in it of any definite nature as to any trusteeship or property taken over in trust or anything of that sort, which any court of equity could say was any foundation for a decree if it had been written for a party himself, and if it could not control the result it makes no difference.

Migeon v. Montana Cent. Ry. Co., 77 Fed. 249 (9 C. C. A.)
Engelstad v. Dufresne, 116 Fed. 582 (9 C. C. A.)

IV.

NO ERROR IN EXCLUDING INVENTORY.

Counsel assigns as error, again without citation to the Record, (see his assignment, Rec. p. 116), Appellant's Brief, p. 37, or his index to Record, that the court erred in not admitting the inventory of the estate of P. B. Smith in evidence. We cannot to the time of press find but that this is abandoned. The introduction of this inventory unless and until the court should order an accounting, was not necessary, if at all. The answer admits the amount of the estate of the deceased as it went through the Probate Court. If it is true, as was claimed, that the estate was larger than estimated in the robate Court, still the inventory would only give the estimate in the Probate Court. It could not have served any purpose as to details of the estate that was put into the Probate Court for they appear in the first complaint page 57 of the Record in the Minnesota Court and that was in evidence. And they appear in the 17th sub-division of plaintiff's complaint, on page 19 of the present complaint, and they are admitted in paragraph 17 of page 45 of the answer in this case; and it is there set up that the only property not included in that inventory was the note of plaintiff which was given to her and one item of eight shares of bank stock that were overlooked, and that was substantially the same as the mining stocks which were worthless, but were

erroneously appraised. Counsel had the opportunity to examine the defendant as to whether there was outside property, and they produced no evidence of any other property. Without a decree, therefore, of specific performance, and a decree for an accounting there could be no possible use of going into the matter of what the defendant got further than this. But at any rate, error or no error, it was immaterial for under the decisions cited in the last subdivision above, it was nothing which could have controlled the result and therefore harmless. If the plaintiff was not entitled to recover, then it mattered not what the defendant got. If the plaintiff was entitled to recover, then the evidence showed no outside property that could be in any way found by introduction of that inventory and all of the facts contained in the inventory were in the Record by admissions. This point is little short of frivolous.

In conclusion, then we have not the story of a man of two families bound to him by the laws of either man or God, but the story of a hard-working business man with one family whom he loved and was bound by all the laws of civil society to protect. There has passed into and out of his home a stepdaughter by a former marriage, whom his generosity had protected against the necessity of a struggling, professional start and the evils of a husband's dissapation. He had loved the children and liked them to his death. That stepdaughter had dispelled his love for her; had wasted his substance and brought sorrow to his last years; he had appealed to her relations, but they let her go among strangers; he had contributed till she married; he contributed to the boys till she built a home in which he aided; she had passed the boys to the protection of an adopted father and grandfather and within his lifetime he found freedom from care.

He took them from his will and gave his property where it belonged—to the appellee, who had helped to accumulate more than half; had loved and cared for him until and in

his years of wasting health, and through her love legally and intentionally evidenced had inherited his property, before the appellant had become estranged from a second husband and gone to her natural home with a father whom the deceased relieved of her suppoprt in her expensive years, a place where her extravagances can be checked and the boys given self-reliance, health and education—a fruit farm on the Pacific slope.

Upon the other hand, for nine years the appellant has pursued the appellee with unfounded claims and unreasonable charges to get something for nothing.

The decree of the lower court was in accordance with justice and the only decree that should be rendered in this case for the following reasons:

1. There was no contract such as the plaintiff claimed.
2. Consequently, there was no modified contract.
3. There was no agreement upon the part of the defendant, either to give up her husband's estate or to take it in trust.
4. The defendant and her family were much more than compensated for any services which they rendered to Mr. Smith, and the services were of such a nature that a claim could have been presented for it in Probate Court. It was not meritorious; it was within the Statute of Frauds; it was against the rules of mutuality; it was inequitable; it was against the understanding of deceased; it was against his will; and the sort of an action which a court of conscience ought not to favor on the merits.
5. The matter, as presented to the Minnesota court, was decided adversely to her in that court. Six years elapsed. One witness to the will of 1902 had died; one witness to the last will had died; the man who kept the last will for the deceased and who delivered it to the defendant as a surprise to her after Mr. Smith's death, had himself died; the plaintiff had made no such claims during the lifetime of Mr. Smith when he himself was sending her away and stopping

the allowance for her, and the boys, in a manner that would have been inconsistent with the contract, had one been made; the estate had been probated without claim of the plaintiff; there was no corroborative evidence of any contract, and no definite arrangement shown; the defendant had married the plaintiff without any knowledge of any claim and had probated the estate, and after the action was decided her way, had married again, and the plaintiff was bound not only by the Minnesota decisions but by the rules of laches and estoppel after keeping quiet until those valuable witnesses had died, and attempted to go to Oregon, where she hoped the rules were liberal, to make a second prosecution of her case.

If the full faith and credit clause of the Federal Constitution is not observed with respect to the Minnesota judgment, then there is no reason why it should be observed as to the decision rendered in this case, and the plaintiff may go into the state court or wait until she gets the defendant within the jurisdiction of another state or another federal court and keep on indefinitely her method of prosecution; and why? Counsel asks to let them use the letter of Mr. Brown that informed her that she could not coerce or cajole the defendant into a settlement and was not likely to get results out of a contingent lawsuit.

Without, therefore, yielding any deference to the conscience of a court of equity, or denying the ambitions of counsel to have this court say that it is required to administer Divine law, we suggest that neither equity nor Divinity can turn falsehood into truth with eloquence alone as the basis.

And if the time ever comes when stories like this, under circumstances like those in this Record shall compel a court of equity to reverse a decision upon such a Record and for such reasons as are given, it will then be time to modify the rules by which records are measured, be they human or Divine. If the plaintiff can recover in this case, then the

security of every estate in the land could easily be attacked by the slightest maneuvers in the lifetime of its owner, and irrespective of the statutes which require the formalities of the lines of descent and allow a man to make his will as he pleases.

Respectfully submitted.